IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
Gleicher, P.J., and Cavanagh and Fort Hood, JJ

IN RE HICKS/BROWN MINORS

Circuit Court No. 12-506605-NA
Court of Appeals No. 328870
Supreme Court No. 153786

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

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STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR FILING AMICUS BRIEF

This Court granted the National Association of Counsel for Children's motion to file an amicus brief on October 5, 2016, and ordered that the amicus brief would be accepted as timely filed if it was submitted on or before October 31, 2016. Amicus files this brief in accordance with that order.

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant leave in this matter to determine whether the Court of Appeals correctly vacated the order terminating Ms. Brown's parental rights where the DHHS failed to make reasonable efforts to reunify Ms. Brown with her children after failing to provide services that accommodated Ms. Brown's known intellectual disabilities?

Appellant answered: Yes.

Appellee-Mother answered: No.

Minor Children answered: Yes.

Amicus answers: No.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The NACC is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the wellbeing of America's children. Founded in 1977, the NACC consists of nearly 3,000 professionals from all 50 states and the District of Columbia. Its Board and membership include attorneys who represent children before the family and juvenile courts of the nation, as well as judges and members from the fields of medicine, social work, mental health, education, and law enforcement.

The NACC works towards multiple goals, including, among others, improving courts and agencies serving children and advancing the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program.

The NACC has contributed numerous *amicus curiae* briefs to federal and state appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae. Amicus* cases must pass staff and Board of Directors review, which evaluates cases based on the consistency with the mission of the NACC, the widespread impact in the field of children's law, the argument's foundation in existing law or a good faith extension of the law, and the reasonable prospect of prevailing.

STATEMENT OF FACTS

Amicus Curiae adopts and incorporates by reference the Statement of the Case set forth in the supplemental brief of the Respondent Mother.

"No matter where they live in the world, no matter what they eat for dinner, no matter where they go to school, there is one common thread you can find in every child; they expect to go to bed and wake up with the same family. In almost every situation, children thrive most with their natural families."[1]

INTRODUCTION

There is perhaps nothing more basic to our human nature than the love of a parent and a child's love in return. This reciprocal loving relationship forms the basis of our society, and shapes the rules of law that govern us. The sacredness of this relationship is recognized as a fundamental right of a parent in the "care, custody, and management" of his or her children protected by the federal Constitution. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). And yet, as with any human endeavor, a parent's love is never perfect, and in some cases, is far from it. But the law, in upholding the sacredness of this relationship, does not require perfect or even model parenting. In fact, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky*, 455 US at 753. Instead, that liberty interest endures.

ARGUMENT

I. The interests of parent and child are mutual and reciprocal, not antithetical.

The primary focus of this case and all cases involving the termination of parental rights is the best interests of the children. MCL 712A.19b, governing termination of parental rights, sets

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[1] *See* National Counsel on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, at 101 (2012), *available at* http://www.ncd.gov/publications/2012/Sep272012 (hereinafter "*Rocking the Cradle*") (quoting Catherine R. Lawrence, Elizabeth A. Carlson, and Byron Egeland, "The Impact of Foster Care on Development," *Development and Psychopathology* 18 (2006) 57).

forth a court's obligations in termination proceedings, stating that "[i]f the court finds that there are grounds for termination of parental rights and *that termination of parental rights is in the child's best interests*, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5) (emphasis added). The National Association of Counsel for Children comes before this Court as amicus with a primary focus consistent with that goal—ensuring that the best interests of the children of Michigan are served and protected by the court system when that system is making decisions that profoundly affect their lives and wellbeing.

In the context of termination proceedings, the interests of a child and the interests of a parent are often unduly pitted against one another, as if these interests were antithetical and mutually exclusive.[2] But to the contrary, these interests are, as the law recognizes, interrelated and intertwined—mutual and reinforcing.[3] "[U]ntil the State proves parental unfitness, the child

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[2] *See Rocking the Cradle*, at 81 ("Commentators have characterized the court's approach to child protection involving parents with disabilities as one of 'risk management,'" and "[a] false dichotomy is established in which the children's rights are balanced against the rights of the parents."). Construction of this false dichotomy by courts is contrary to the direction provided by the United States Supreme Court. *Santosky*, 455 US at 760 ("At the factfinding, the State cannot presume that a child and his parents are adversaries.").

[3] *See* Joshua B. Kay, *Representing Parents with Disabilities in Child Protection Proceedings*, The Michigan Child Welfare Law Journal, Fall 2009, at 27, *available at* http://docplayer.net/584792-The-michigan-child-welfare-law-journal.html (hereinafter "*Representing Parents with Disabilities*") ("It is a mistake to assume that children are somehow less attached to parents who have disabilities; just like in other families, these children generally will be best served within the family of origin if at all possible."); see also US Department of Health and Human Services and US Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, *available at* https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html (hereinafter "*USDHHS DOJ Technical Assistance*") ("The goals of child welfare and disability non-discrimination are mutually attainable and complementary.").

and his parents share a vital interest in preventing erroneous termination of their natural relationship . . . [and] the interests of the child and his natural parents coincide . . . ." *Santosky*, 455 US at 760-61. It is only after the State has conclusively proven unfitness that a court may assume that the interests of a child and a parent diverge. *Santosky*, 455 US at 760 ("At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. . . . But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."). But where, as here, a parent with a disability has not been provided properly tailored services to achieve reunification, the court lacks the necessary information to make a finding of unfitness, and any attempt to make such a finding is premature.

When a parent's rights are terminated, the relationship is irrevocably severed and the parent and child become legal strangers. *Santosky*, 455 US at 747 (describing termination as "completely and irrevocably" severing the rights of a parent). Because ending such a fundamental relationship in a child's life has dramatic and damaging consequences for a child, a parent's and child's interests are not conflicting in the context of termination proceedings.[4] When the family bond is threatened by state intrusion, the needs of the child are put at risk and

[4] *See Rocking the Cradle*, at 76 ("[A] parent's evidentiary attack should not be viewed as necessarily contrary to the interests and rights of a child; if a parent has been discriminated against, and the parent-child relationship is severed, in part or in whole, because of this discriminatory treatment, the severance has drastic, and potentially harmful, consequences for the child.").

"the effect on the child's developmental progress is invariably detrimental."[5] While the need for permanence for a child is often recognized as essential, "[m]any child development theorists and practitioners argue that despite the need for permanence, children are harmed by TPR[] and severing the relationship with a biological parent is deeply traumatic, even when that parent has been neglectful."[6] Conversely, children in foster care benefit from having contact with a parent, and children in borderline situations do better when they can remain at home.[7] Even where there may be an adoptive family poised to provide a stable, nurturing environment, termination of parental rights resulting in adoption is not without significant consequences. "[O]ne study indicates that adopted children cut off completely from their biological parents often experience a sense of profound deprivation," while other studies have shown "children of parents with intellectual disabilities whose rights were terminated experienced a deep sense of loss" because "[o]ften the bond between the parent and child is especially strong."[8]

If the State is going to intervene by severing the most fundamental relationship in a child's life and impose the trauma associated with termination, it should do so only after the State has complied with the legal obligation to provide properly tailored services to address the issues that led to the court's involvement with the family. In fact, courts have held that where

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[5] *Id.* at 101.

[6] *Id.* at 101-102 (internal quotation marks and citation omitted).

[7] *Id.* at 102 ("Substantial evidence demonstrates children in foster care benefit from contact with their parent "in terms of greater emotional security and self-esteem and improved ability to form relationships.") (internal quotation marks and citations omitted); *id.* at 104 ("Children on the margin of foster care placement have better employment, delinquency, and teen motherhood outcomes when they remain at home . . . . Kids who can remain in their homes do better than in foster care.") (internal quotation marks and citations omitted).

[8] *See Rocking the Cradle*, at 105.

the State had, instead, failed to make reasonable efforts to reunite a family, the court cannot terminate a parent's rights because termination in such circumstances is premature. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) ("Here, because the DHS and the court failed to adhere to court rules and statutes, respondent was not afforded a meaningful and adequate opportunity to participate. Therefore, termination of his parental rights was premature."). Furthermore, the State's concern with a child's interest in reunification through provision of services is made clear through the administrative code, which requires that DHHS assess "all persons in the child's family to determine the services best suited to meet the child's needs." Mich. Admin. Code R 400.12419(1)(d). Without a case service plan designed to accommodate a parent's disability and meet a child's needs, termination is premature.

Under the law, a parent's fundamental right to raise his or her child does not disappear when a child is placed in the child welfare system. Instead, this right endures because a child's best interests are most often served by preserving this fundamental relationship and preventing a parent from becoming a legal stranger to his or her natural child.

II. Discrimination in the child welfare system against individuals with disabilities is a state-wide and nation-wide issue.

This case offers a window into a state-wide and nation-wide problem of discrimination against parents with disabilities in the child welfare system. Ms. Brown's circumstances are unfortunately not unique—"parents with disabilities are overly, and often inappropriately, referred to child welfare services, and once involved, are permanently separated at disproportionately high rates."[9] The United States Department of Health and Human Services'

[9] *USDHHS DOJ Technical Assistance* (citing *Rocking the Cradle*, at 14, 18). *See also Representing Parents with* Disabilities, at 27 ("Child welfare issues have become a

Office for Civil Rights and the Department of Justice Civil Rights Division have "received numerous complaints of discrimination from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising."[10] The USDHHS and the DOJ took notice of this issue, and they "have found that child welfare agencies and courts vary in the extent to which they have implemented policies, practices, and procedures to prevent discrimination against parents and prospective parents with disabilities in the child welfare system."[11]

The USDHHS and the DOJ, finding it necessary to provide guidance regarding the protection of the rights of parents with disabilities, has issued "technical assistance to assist state and local child welfare agencies and courts to ensure that the welfare of children and families is protected in a manner that also protects the civil rights of parents and prospective parents with disabilities."[12] Unfortunately, the challenges Ms. Brown faces are not strictly personal—they reflect widespread failures of this country's and this state's child welfare system.

III. The intersection of disability and poverty creates an environment for discrimination.

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significant concern to the disability community, particularly for people with cognitive or psychiatric disabilities, because they are disproportionately involved in the child welfare system and, once involved, they are far more likely than nondisabled parents to have their parental rights terminated."), and 28 ("Once a child is removed, the stereotype of cognitive disability as immutable and irremediable may be applied so that it is seen as an irremovable barrier to child care. Thus, parents with cognitive disability are more likely to face eventual termination of their parental rights.").

[10] *USDHHS DOJ Technical Assistance.*

[11] *Id.*

[12] *Id.*

The child welfare system is significantly involved with families that have a parent with an intellectual disability, particularly those who lack financial resources. "One quarter of families with a disabled parent live below the official poverty level, making them twice as likely as other families to be living in poverty."[13] More specifically, "[p]arents with intellectual disabilities are also likely to be living in poverty," and "experts assert that parents with intellectual disabilities are often held to a higher standard of parenting than non-disabled parents."[14] As the National Counsel on Disability reports, "[p]overty is a factor in the increase in the number of children placed in foster care," and where a parent has an intellectual disability, the removal "rates range from 40 percent to 80 percent."[15]

It is this intersection of poverty and disability that creates the predicament in which many parents—just like Ms. Brown—find themselves. "Unlike people with the financial resources to buy services privately, people who live in poverty are likely to come to the attention of the state by accessing public assistance."[16] The combination of the heightened intrusion into a family's

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[13] *See also Representing Parents with Disabilities*, at 28.

[14] *Rocking the Cradle*, at 80.

[15] *Id.*, at 78, 103.

[16] *Id.* at 80 (citing *Representing Parents with Disabilities*, at 28 ("Poverty plays a significant role in bringing parents with disabilities into contact with service providers who may end up being the source of a CPS referral, and poverty itself is the most consistent characteristic in families in which child neglect is found.")); see also Charisa Smith, *Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges*, 5 Charlotte L. Rev. 377, at 400 (2014) (hereinafter "*Unfit Through Unfairness*") ("Discrimination may also be evident where agencies investigating child abuse and neglect reports give deference to reports coming from medical or social work professionals. The mentally challenged routinely have more contact with these professionals to begin with than do other parents. They are therefore more likely to be the subject of scrutiny by professionals who work in public systems. Likewise, because a majority of mentally challenged parents facing TPR are poor and often minorities, they may not have the luxury of staying at home with their children while they receive the treatment they need. Mentally challenged parents

private life necessitated by poverty and the heightened parenting standards for parents with a disability who are, by default, viewed as unfit, initiate the mechanisms that ultimately lead to termination of parental rights. Ms. Brown's circumstances illustrate this intersectionality and its devastating effects.

IV. Parents with intellectual disabilities are presumed unfit.

A history of discrimination towards parents with intellectual disabilities has been built on a bias that presumes a parent with an intellectual disability is unfit. In circumstances involving a parent with disabilities, the child welfare system is more likely to be involved due to allegations of neglect rather than abuse or risk of abuse.[17] This is an important distinction because it reflects a deep-seated bias against parents with disabilities who may be forced to parent differently than parents without disabilities. Studies have shown that even among parents with disabilities, parents with intellectual and psychiatric disabilities face greater discrimination due to stereotypes, a failure to tailor assessments appropriately, and failure to provide necessary services.[18] There is a "[p]resumption of incompetence, that is, a general belief that people with intellectual and/or developmental disabilities are unfit to be parents."[19] This presumption is

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may be subject to housing and job discrimination, which lessens their chances of providing high quality homes. This discrimination may open up their parenting to increased criticism.").

[17] *Rocking the Cradle*, at 78. See also *Unfit Through Unfairness*, at 389 ("Most parents with mental challenges involved in TPR proceedings are the subject of neglect inquiries, rather than inquiries about affirmative abuse.").

[18] *USDHHS DOJ Technical Assistance* (citing *Rocking the Cradle*, at 92-93).

[19] The ARC, *Position Statement: Parents with Intellectual and/or Developmental Disabilities* (hereinafter "*ARC Position Statement*"), *available at* http://www.thearc.org/who-we-are/position-statements/life-in-the-community/parents-with-idd. See also *Representing Parents with Disabilities*, at 28 ("These parents may be confronted with assumptions that

reinforced with discriminatory practices: (1) "[l]imited supports to parents with intellectual and/or developmental disabilities," (2) "[p]rofessional emphasis on limitations of parents with intellectual and/or developmental disabilities to the point of weakening parents' sense of competence and potential for success," (3) "[p]ublic resources primarily focused on crisis-driven support," and (4) "[d]isproportionate representation of parents with intellectual and/or developmental disabilities in child custody proceedings, where, their competence as parents is held to higher, less flexible and more frequently applied standards than those applied to other parents."[20] When parents with intellectual disabilities find themselves involved in child welfare proceedings, they are often met with courts that are ill equipped to handle such cases. "Courts may have limited understanding of disability issues, and large dockets may interfere with the ability of a court to make the kind of inquiry needed to determine what a parent with a disability needs in order to be successful in a case."[21]

V. The ADA applies to termination proceedings, and if the DHHS has notice of a parent's intellectual disability, failure to provide appropriate services is grounds for reversing a termination decision.

A. The ADA applies to termination of parental rights proceedings involving parents with an intellectual disability.

In the face of this discrimination, the ADA provides protections for individuals with intellectual disabilities, stating: "subject to the provisions of this subchapter, no qualified

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they are unable to learn how to provide adequate care for their children or that their disability is set in stone and thus change is impossible.").

[20] *Id.*

[21] *See also Representing Parents with Disabilities*, at 27 ("The child welfare system is never easy for a parent to navigate, and parents with disabilities face particular and serious challenges at all stages of a child protection proceeding. These challenges may include bias on the part of Child Protective Services (CPS) workers, a lack of appropriate family preservation and reunification services, and inadequate legal representation.").

individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132; *In re Terry*, 240 Mich App 14, 24; 610 NW2d 563 (2000). The DOJ and the USDHHS have clarified that parents with disabilities are protected by the ADA.[22] Specifically, Title II of the ADA's "services, programs, and activities" covers termination of parental rights proceedings.[23] The DOJ and the USDHHS explained that "state court proceedings, such as termination of parental rights proceedings, are state activities and services for purposes of Title II," and an ADA claim may be raised in child welfare proceedings.[24] "The unjust separation of families of people with disabilities is exactly the type of discrimination the ADA seeks to eradicate."[25]

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[22] *See USDHHS DOJ Technical Assistance.*

[23] *See id.*; see also Jennifer Mathis, *Keeping Families Together: Preserving the Rights of Parents with Psychiatric Disabilities*, Clearinghouse Review: Journal of Poverty Law and Policy, Vol. 46, 11-12 (2013), *available at* http://povertylaw.org/clearinghouse/author/jennifer-mathis (hereinafter "*Keeping Families Together*") ("Reunification and other family preservation services are 'programs, services, or activities.' Similarly, proceedings to terminate parental rights are a program or activity.").

[24] *USDHHS DOJ Technical Assistance* ("An aggrieved person may raise a Title II or Section 504 claim in child welfare proceedings."); *see also Pennsylvania Dep't of Corr v Yeskey*, 524 US 206, 209-12; 118 S Ct 1952; 141 L Ed 2d 215 (1998) (discussing the breadth of Title II's coverage); 28 CFR 35.190(b)(6) (designating the DOJ responsibility for investigating of complaints and compliance reviews of "[a]ll programs, services, and regulatory activities relating to . . . the administration of justice, including courts"); *Keeping Families Together*, at 11-12 (explaining that by its terms, the ADA is applicable to the provision of services designed to help parents maintain or regain custody as well as to the initiation of termination of parental rights proceedings).

[25] Jeniece Scott, et al., UPenn Collaborative on Community Integration & Judge David L. Bazelon Center for Mental Health, *Supporting Parents with Psychiatric Disabilities: A Model Reunification Statute*, *available at* http://bit.ly/W0HiUq.

Several courts have recognized the ADA's application to termination of parental rights ("TPR") proceedings, applying it without question or finding that it provides a defense in TPR proceedings. *In Matter of Burrows*, unpublished opinion of the Ohio Court of Appeals, issued May 30, 1996 (Docket No. 95CA1698), p *3 ("[F]or purposes of this appeal, we assume without deciding that the ADA applies to this case[.]"); *In the Interest of KKW*, 7 Nat'l Disability Law Reporter (Tex Co Ct Jul 11, 1995) (state violated ADA by failing to modify its reunification services to ensure equally effective services to parent with schizophrenia); *In the Matter of John D*, 123 NM 114, 119-120; 934 P2d 308 (NM App 1997) (ADA provides a defense to evidence of presumptive abandonment when parent can show that she or he lacked responsibility for the destruction of the parent-child relationship owing to the state's violation of the ADA); *see also In re Caresse B*, unpublished opinion of the Superior Court of Connecticut, issued Mar. 11, 1997 (No Docket Number); *In the Interest of CC*, unpublished opinion of the Court of Appeals of Iowa, issued Dec. 22, 1995 (Docket No. 95–1022); *In re Dependency of CC*, 94 Wash App 1020 (1999) (unpublished opinion); *JT v Arkansas Dep't of Hum Servs*, 329 Ark 243; 947 SW2d 761 (Ark 1997); *Welfare of KDW*, unpublished opinion of the Minnesota Court of Appeals, issued Apr. 19, 1994 (Docket No. C5-93-2262); *In re CM*, 996 SW2d 269 (Tex App 1999).

In Michigan, following the Court of Appeals decision sixteen years ago in *In re Terry*, it has been settled law that "the ADA does require a public agency, such as the Family Independence Agency (FIA), to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services," and "the reunification services and programs provided by the FIA must comply with the ADA." *Terry*, 240 Mich App at 25. Moreover, "under MCL 712A.18f(4); MSA 27.3178(598.18f)(4), before entering an order of disposition, the court must determine whether the FIA has made

'reasonable efforts' to rectify the conditions that led to its involvement in the case." *Id.* at 25-26. *Terry* held that the FIA "reasonable efforts" requirement was consistent with the ADA's "reasonable accommodation" requirement and, therefore, "if the FIA fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id.* at 26. *Terry* also held that "[a]ny claim that the FIA is violating the ADA must be raised in a timely manner . . . [and] if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, either when a service plan is adopted or soon afterward." *Id.* The Court of Appeals, however, did not explain how a timely request should be made. *Id.*

Nevertheless, many courts, including *Terry*, have held "that termination of parental rights proceedings do not constitute 'services, programs or activities.'" *Terry*, 240 Mich App at 25. Consequently, "a parent may not raise violations of the ADA as a defense to termination of parental rights proceedings." *Id.*; *see also In re Doe*, 100 Hawai'i 335, 343; 60 P3d 285 (2002) ("[W]e are not presented with a separate case where a parent has raised an affirmative claim under the ADA against the DHS. Instead, Mother has presented an alleged violation as a defense to a proceeding involving her parental rights . . . the statute does not state that an appropriate remedy for an ADA violation is to allow an injured party to utilize the ADA as a defense in a separate proceeding."); *In re Adoption of Gregory*, 434 Mass 117, 747 NE2d 120, 125 (2001) ("[P]roceedings to terminate parental rights do not constitute 'services, programs, or activities' for the purposes of 42 U.S.C. § 12132, and therefore, the ADA is not a defense to such proceedings."). This is wrong and improperly shifts the burden when, as here, the disability is evident and the need for accommodation obvious.

These courts fail to consider the practical implication of their decisions: by not allowing parents to raise the ADA as a defense to termination, these courts deny parents any meaningful remedy. The only court that can remedy a violation of the ADA in the context of child welfare proceedings and ultimately termination proceedings is the family court. The remedy is appropriate services to allow for reunification and preventing a parent's rights from being terminated. A judgment in the parent's favor in a separate civil proceeding cannot provide this remedy. Therefore, "where the state fails to make reasonable modifications of family reunification or preservation services to meet the needs of parents with psychiatric disabilities, those parents should be able to assert the ADA defensively in child welfare proceedings that seek to terminate parent rights . . ."[26] The DOJ and the USDHHS's guidance was provided to make clear that, contrary to statements in decisions like *Terry*, the ADA applies to termination proceedings.[27] "The goals of child welfare and disability non-discrimination are complementary," and for this reason it would be contrary to the ADA to find that it does not apply to termination proceedings.[28]

B. The DHHS must be put on notice of the parent's disability.

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[26] *Keeping Families Together*, at 519 (2013).

[27] *See USDHHS DOJ Technical Assistance* (explaining that "services, programs, and activities" under the ADA includes "proceedings to terminate parental rights") (further discussing the requirement of filing a termination petition when a child has been in foster care for 15 of the last 22 months, explaining "[A] child welfare agency should provide the family of the child with the services necessary for the safe return of the child to the child's home in a manner that meets the unique needs of the family. Failure to provide services, including services to address family members' disability-related needs, could qualify as an exception to the termination of parental rights requirement.").

[28] *Id.*

It is axiomatic that the DHHS cannot provide services that accommodate a disability if the DHHS does not have notice of that disability. "A public entity cannot know that a modification to its services under the ADA is necessary if it does not first understand that an individual requires such modification *because* he is disabled." *Robertson v Las Animas Cty Sheriff's Dep't*, 500 F3d 1185, 1196 (CA 10 2007). Such notice, however, need not be expressly provided because "sometimes the [person]'s need for an accommodation will be obvious; and in such cases, different rules may apply." *Kinman v New Hampshire Dep't of Corrections*, 451 F3d 274, 283 (CA 1 2006). For example, the Tenth Circuit held:

> [B]efore a public entity can be required under the ADA to provide an auxiliary aid necessary to afford an individual an equal opportunity to participate in the entity's services, programs, or activities, the entity must have knowledge that the individual is disabled, either because that disability is obvious or because the individual (or someone else) has informed the entity of the disability.

Id. at 1195; *see also In re Victoria M*, 207 Cal App 3d 1317, 1329; 255 Cal Rptr 498 (Cal App 1989) ("Carmen obviously is developmentally disabled . . . Her disability should have been apparent to those assessing the suitability of services offered to her. And yet Carmen's disabilities were not considered in determining what services would best suit her needs.").

This type of "obvious" notice is especially critical when dealing with individuals with intellectual disabilities. As recognized by one court in the context of an inmate with a disability, to suggest that an obvious disability need not be accommodated unless an individual requests accommodations "is truly baffling as a matter of law and logic" because it requires an individual to somehow overcome his or her disability to convey that he or she needs accommodations. *Pierce v DC*, 128 F Supp 3d 250, 269 (DDC 2015), rec. den., 146 F Supp 3d 197 (DDC 2015)

("The District does not explain how inmates with known communications-related difficulties (such as Pierce) are supposed to communicate a need for accommodations, or, for that matter, why the protections of Section 504 and Title II should be construed to be unavailable to such disabled persons unless they somehow manage to overcome their communications-related disability sufficiently enough to convey their need for accommodations effectively"); see also *Randolph v Rodgers*, 170 F3d 850, 858-859 (CA 8 1999) ("While it is true that public entities are not required to guess at what accommodations they should provide, the requirement does not narrow the ADA or RA so much that the [public entity] may claim [the disabled person] failed to request an accommodation when it declined to discuss the issue with him."). Accordingly, once the DHHS has notice of a parent's intellectual disability, it must provide reasonable accommodations to remedy the issues that led to the child's removal.

There may be many sources of notice. First, the DHHS, through case workers and other staff, and the court, in hearings and proceedings involving the parent, may obtain notice by simply interacting with the parent. To the extent that an individual's disability is obvious such that it is known to the DHHS, the individual or his or her agent need not expressly alert a case worker, a judge, a health care provider, etc. that the individual has an intellectual disability. Second, objective IQ tests and other psychological testing and evaluation indicating an intellectual disability provide sufficient notice to the DHHS and the court that reasonable accommodations must be provided. Such testing should be used with caution because "a number of studies have shown that the parental-child relationship dictates parental fitness and not IQ levels."[29] However, where such testing is performed, as it was in Ms. Brown's case, it provides

[29] *Rocking the Cradle*, at 78, 133.

an objective indication that an individual is in need of services tailored to his or her intellectual abilities that the DHHS and courts cannot ignore. Finally, the parent or his or her agent may provide either the DHHS or the court with express notice of his or her intellectual disability.

In this case, the Court of Appeals correctly found that the DHHS was given sufficient notice of Ms. Brown's disability and thus the *Terry* timing requirement was met. *In re Hicks/Brown*, __ Mich App __, __; __ NW2d __ (2016) (Docket No. 328870); slip op at 10 ("The DHHS did not file its supplemental petition seeking termination until 10 months after Gilflix's specific request for ADA-compliant services. The termination hearing took place on July 27, 2015, nearly a year after Gilflix' first expressed her concern. Given the length of time between Gilflix's objection and the termination proceedings, respondent's challenges are not waived under *Terry*.").

C. Once on notice, the DHHS has an affirmative duty to provide reasonable accommodations to the disabled parent prior to terminating his or her parental rights.

Before terminating the rights of a parent with an intellectual disability, the DHHS must provide reasonable accommodations to that parent. *Terry*, 240 Mich App at 25. Under Michigan law, the DHHS has the responsibility to develop an appropriate service plan that involves reasonable efforts to resolve the conditions that led to removal, MCL 712A.18f(4), and in light of the ADA, that service plan must involve reasonable efforts to accommodate a parent's disability. And yet "[w]hen the reunification services required by most jurisdictions are offered, such

services often do not address the parent's disability fully, often making them of little use to the family and preventing actual reunification."[30]

Under the ADA, the DHHS has an *affirmative duty* to provide reasonable accommodations for parents with intellectual disabilities. See, e.g., *Mary Ellen C v Arizona Dep't of Econ Sec*, 193 Ariz 185; 971 P2d 1046 (Ariz App 1999) (holding that the state had an obligation to make reasonable efforts to rehabilitate parent who suffered from disabling mental illness before seeking termination of parental rights, and the state failed at this *duty*). As explained by the Fifth Circuit in the context of a disabled arrestee:

> [T]he ADA expressly provides that a disabled person is discriminated against when an entity fails to 'take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.' *A plain reading of the ADA evidences that Congress intended to impose an affirmative duty* on public entities to create policies or procedures to prevent discrimination based on disability.

Delano-Pyle v Victoria Cty, Tex, 302 F3d 567, 575 (CA 5 2002) (emphasis added); see also *Pierce*, 128 F. Supp. 3d 250 ("[P]rison had *affirmative duty* to evaluate newly incarcerated deaf inmate's accommodation requirements, and its failure to do so denied inmate benefits under Rehabilitation Act and ADA.") (emphasis added).

D. With reasonable accommodations, a parent with intellectual disabilities can adapt and competently parent.

Some parents with intellectual disabilities, even with appropriate services, will not be able to function as safe and nurturing parents, but the same is true of individuals without

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[30] *Unfit Through Unfairness*, at 401.

intellectual disabilities. An intellectual or developmental disability does not itself prevent a parent from being a good and loving parent.[31] Studies indicate that there is a "huge spectrum of parenting skills" among individuals with intellectual disabilities with varying degrees of need for support and ability to benefit from such support.[32] With the proper support, parents with intellectual disabilities can unlearn improper parenting techniques, replacing them with proper behaviors, and a safe, loving relationship can develop.[33] While increased exposure leads to increased involvement by the State, such exposure can, and should, result in the provision of appropriate and necessary services.

The question becomes what kind of services may a parent with an intellectual disability need in order to achieve reunification? In addition to typical counseling services provided under case service plans, "many families need concrete services, like financial assistance, housing,

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[31] *ARC Position Statement* ("The presence of an intellectual and/or developmental disability does not in itself preclude effective parenting; therefore, the rights of parenthood must not be denied individuals solely on the basis of intellectual and/or developmental disabilities. Parents with intellectual disabilities should have access to support as needed to perform parental roles just as they are supported in other valued social roles and activities.").

[32] *Unfit Through Unfairness*, at 386 ("While studies of mentally challenged parents reveal that there is a huge spectrum of parenting skills in this group, above all, support and assistance for these parents can often lead to successful parenting. For example, studies of ID parents reveal that at best, some are fit to parent without special assistance, others are fit to parent if given assistance, and others are not fit to parent with or without assistance.").

[33] *Id.* at 387-88 ("Ultimately, ID and developmentally disabled parents are most likely to succeed when they can enjoy the virtues of interdependence and communality. When provided with peer, family, and often external support, wonderful parent-child relationships--and safe children--tend to develop.") (internal quotation marks and citation omitted).

medical care, food, transportation, and help getting a job or public assistance."[34] Studies have been undertaken to determine what kind of services would be effective.

> [One leading researcher in this field] found that weekly training visits of 1-2 hours using techniques like simplified instructions, task analysis, pictoral prompts, modeling, feedback, role-playing, and positive reinforcement were effective to enhance child-care skill, and the gains were maintained by the experimental group and subsequently replicated in what had been a control group earlier in the study. The most striking result is that 82% of the parents who had a previous child had lost parental rights to that child, but after the training only 19% lost their rights to the target child, and those parents had left the program early and against the advice of the researchers.[35]

This study demonstrates that, with the proper services and support, reunification is achievable.

In the present case, Ms. Brown was not provided services that were targeted at addressing her particular needs due to her intellectual disability. As explained in Appellee's Supplemental Brief, Ms. Brown's existing provider had the capacity to provide developmental disability services, but Ms. Brown's caseworker waited until a month before the termination hearing to begin exploring those options. Appellee's Supp. Br., at 33-34. As indicated from the above research, what Ms. Brown needed was more intensive services, which apparently were available, but were never provided. *In re Hicks/Brown*, __ Mich App __, __; __ NW2d __ (2016) (Docket No. 328870); slip op at 17 ("The record establishes that several agencies provide wrap-around services for the cognitively impaired in the metropolitan Detroit area. Respondent was even referred for generalized services at some of those agencies. Yet, the DHHS did not seek to have respondent placed in any of the programs geared toward the cognitively impaired until several

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[34] *Representing Parents with Disabilities*, at 29.

[35] *Id.*

months after Gilflix objected in August 2014."). While the provision of such services does not guarantee success, termination of parental rights without providing such services deprives the parent of the opportunity to demonstrate his or her fitness to parent and deprives a child of the ability to maintain a relationship with his or her natural parent.

E. Termination of parental rights without providing services to accommodate a parent's intellectual disability is grounds for reversal because termination is premature and not in a child's best interests.

It is critical to remember that termination of parental rights does not just invoke the fundamental constitutional rights of a parent to raise his or her natural child, it invokes the child's reciprocal interest in having a relationship with his or her natural parent. At such a profound turning point in a child's life, a court must remember that the interests of parents and children in maintaining a familial relationship coincide. *Santosky*, 455 US at 760-61. Again, it is only after the State has proven unfitness that a court may assume that the interests of a child and a parent diverge. *Santosky*, 455 US at 760. But where, as here, termination occurs before a parent with intellectual disabilities is given properly tailored services, the Court lacks the necessary information to make a finding of unfitness and termination is premature.

In order to terminate parental rights, a court must find (1) "that there are grounds for termination of parental rights," and (2) "that termination of parental rights is in the child's best interests";[36] specifically, the court must conclude that there is clear and convincing evidence to support at least one ground for termination. MCL 712A.19b(3) and (5). Amicus fully recognizes that this Court must defer to the trial court's factual findings and must review those findings for clear error. *In re Rood*, 483 Mich 73, 90; 763 NW2d 587 (2009). Appellate courts

[36] MCL 712A.19b(5).

review both "the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *Id.* A finding may be found to be clearly erroneous where "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.*

Where, as here, a parent with an intellectual disability has not been provided properly tailored services, the court is in no position to presume divergence of the interests of parent and child, and a finding of unfitness is premature. As Judge Gleicher recognized, it is premature to terminate parental rights where the DHHS failed to provide reasonable efforts to reunite Ms. Brown with her children because failure to provide such services prevented the DHHS from having the necessary clear and convincing evidence to support grounds for termination. *In re Hicks/Brown*, __ Mich App at __; slip op at 1, 18. Therefore, it was proper for the Court of Appeals to vacate the order terminating Ms. Brown's parental rights. There is no more compelling evidence that a mistake has been made than circumstances in which a parent's rights have been irrevocably severed before he or she has been given the reasonable accommodations required under federal law. There can be no doubt that terminating the rights of a parent with an intellectual disability where the DHHS has failed to provide properly tailored services that would give the parent a fighting chance to prove fitness and reunite with his or her child is not within the best interests of the child. Depriving a parent of his or her rights profoundly affects not just the parent; termination fundamentally alters a child's life, development, and his or her overall wellbeing. This Court cannot permit the DHHS to deprive any parent the ability to demonstrate his or her fitness to love, protect, and care for his or her child nor deprive a child a relationship with his or her natural parent without first making meaningful efforts to reunify the family.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court deny leave in this case or, if this Court grants leave, that it affirm the Court of Appeals' opinion.

Respectfully submitted,

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Dated: October 31, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, I electronically filed the foregoing papers with the Clerk of the Court using the TrueFiling e-filing system which will send notification of such filing and e-serve the document upon all attorneys of record.

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Exhibit A

1995 WL 810019

UNPUBLISHED OPINION. CHECK RULES BEFORE CITING.

Court of Appeals of Iowa.

In the Interest of C.C., M.C.,
and M.C., Minor Children,
R.C., Father, Appellant,
S.C., Mother, Appellant.

No. 95-1022.
|
Dec. 22, 1995.

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Court Judge.
Parents appeal the termination of their parental rights to their minor children. AFFIRMED.

Attorneys and Law Firms

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Thomas P. Lenihan, West Des Moines, guardian ad litem for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Ray Blase, Assistant County Attorney, for appellee-State.

Mike Bandstra of Youth Law Center, and Christine Dykeman, legal intern, Des Moines, for appellees-minor children.

Considered by HAYDEN, P.J., and Sackett and HUITINK, JJ.

Opinion

HAYDEN, Presiding Justice.

*1 R.C. and S.C. are the parents of C.C., born April 27, 1992; M.C., born December 2, 1989; and M.C., born January 5, 1988.

R.C. was arrested on July 1, 1993, on charges of sexually abusing several neighborhood children. There were allegations he involved M.C. and M.C. in the abuse. A no-contact order was entered prohibiting R.C. from contacting his children. The children were removed from S.C.'s custody -- with her consent -- on July 23, 1993, and initially placed in the custody of their maternal aunt.

A petition was filed alleging the children to be children in need of assistance (CINA) on July 21, 1993. On August 24, 1993, all three children were adjudicated CINA pursuant to Iowa Code section 232.2(6)(c) (parent fails to adequately supervise) and 232.2(6)(d) (child has been or is imminently likely to be sexually abused by parent). The children remained in their aunt's care until foster care placement was available.

The court ordered S.C. to participate in the Parent Infant Nurturing Center (PINC) program and ordered R.C. to complete a parenting evaluation. R.C. refused to comply with the parental evaluation during the pendency of the criminal charges. S.C. received supervised visitation, which was terminated by the department of human services when M.C. and M.C. disclosed she too had engaged in sexual activities with them. The juvenile court ordered no further visitation until such time as the children's and mother's counselors agreed.

Both M.C. and M.C. have discussed various sex games their parents have engaged in with them. Their descriptions of the abuse have been consistent and never recanted. One doctor, Ann Wellander, testified both boys continued to have great fear concerning contact with their parents. It was this doctor's opinion the children would suffer emotional harm if returned to the custody of either parent. She believed termination of the parental rights was in the best interests of the children.

In March 1994 R.C. plead guilty to two counts of third-degree sexual abuse, three counts of dissemination of obscene material to minors, and one count of indecent exposure. He was sentenced to a total term of incarceration not to exceed twenty-four years. He did not contact the department thereafter. R.C. participates in the sexual offenders' treatment program at the Mount Pleasant Correctional Facility. He has received no services from the DHS.

S.C. functions in the borderline intellectual range and suffers from developmental and mental disabilities. She has been a victim of severe sexual abuse by several persons. She denies she or R.C. have been sexually inappropriate with the children. S.C. rejected DHS's recommendation she reside in a group home. She has participated in PINC, a program specifically designed for the mentally retarded/developmentally disabled. She has also had a Generations' worker to assist her with housing and intakes for services, a payee to assist with budgeting, parenting education, a CASA worker to monitor the case, and individual therapy. S.C.'s counselor testified there are more appropriate services for S.C.'s development and safety than those provided by DHS. The counselor, however, acknowledged S.C. is not, and will not be, capable of parenting these children alone.

***2** A termination petition was filed. The children had been out of their parents' custody for more than one year at the time of the termination hearing. On the morning of the hearing, the children's attorney moved in limine, in light of the fact S.C. had both an attorney and a guardian ad litem, to have S.C.'s guardian ad litem's role limited to stating her position. The motion requested S.C.'s guardian ad litem not be allowed to call witnesses or cross-examine witnesses. The court granted the motion, concluding S.C.'s attorney would adequately represent her.

The juvenile court terminated both S.C.'s and R.C.'s parental rights. The court implicitly rejected R.C.'s claim the State failed to make reasonable efforts to reunite him with his children under the circumstances of his incarceration. The court specifically rejected S.C.'s claim the State had failed to make reasonable accommodations for her disabilities.

Both parents appeal.

I. Scope of Review.

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984) *cert. denied sub nom. J.G. v. Tauke*, 469 U.S. 1222 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. *Id.* at 491-92.

The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

> We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing *Dameron*, 306 N.W.2d at 745).

Iowa Code section 232.116(1)(e) (1991) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:
(1) The child is four years of age or older.

(2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(3) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Iowa Code section 232.116(1)(g) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:
***3** (1) The child is three years of age or younger;

(2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(3) The child has been removed from the physical custody of the child's parents for at least six months of the last

twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

II. Termination of R.C.'s Parental Rights.

The primary concern in the termination of parental rights is the best interests of the children. *In re A.Y.H.,* 508 N.W.2d 92, 94 (Iowa App. 1993). These interests include the children's present physical, mental, and emotional interests, as well as their long-term interests. *Id.* We determine the three children cannot be returned to R.C.'s custody and termination is in the best interests of these children.

Evidence of a parent's past performance may be indicative of the quality of future care he or she is capable of providing. *Dameron,* 306 N.W.2d at 745. There is clear and convincing evidence R.C. perpetrated severe sexual abuse on his children. M.C. was able to demonstrate with the use of dolls the sexual abuse committed against him by his father. Additionally, both M.C. and M.C. talked about the sexual games they played with both of their parents. R.C., however, has refused to admit either he or S.C. sexually abused the children. Given R.C.'s refusal to admit to the sexual abuse, it is doubtful such abuse would cease if custody of the children was returned to him.

Clear and convincing evidence also indicates these children remain in extreme fear of R.C. Witnesses testified the children would have their foster parents check if the windows were locked so R.C. could not take them away. These children should be allowed to put their fears to rest. Clearly, termination of R.C.'s parental rights is in the children's best interests both mentally and emotionally.

R.C.'s release date from prison is February 11, 1999. According to the Iowa State Patrol, the earliest likely parole would be April 1997. These children should not be made to suffer indefinitely in parentless limbo. *Long v. Long,* 255 N.W.2d 140, 146 (Iowa 1977). Patience on behalf of the parent can quickly translate into intolerable hardship for the children. *In re R.J.,* 436 N.W.2d 630, 636 (Iowa 1989). As the trial court noted, these children deserve and need a permanent, stable home. They should not be forced to await such a home while their natural father spends time in prison. As such, termination of R.C.'s parental rights is in the long-term best interests of the children.

We determine termination of R.C.'s parental rights is in the best interests of these children.

III. R.C.'s Due Process Rights.

R.C. contends his due process rights were violated because the State failed to offer services to him as an incarcerated parent. He claims he was denied the opportunity to be heard because caseworkers refused to offer services or develop a case plan which would give him a chance to preserve his relationship with his children. The United States Supreme Court ruled the "reasonable efforts" requirement of 42 U.S.C. Section 671(a)(15) does not confer an enforceable private rights under 42 U.S.C. Section 1983, let alone a constitutional right to "reasonable efforts." *Suter v. Artist M.,* 503 U.S. 347, 363, 112 S. Ct. 1360, 1370, 118 L. Ed. 2d 1, 15-16 (1992). We do not confer upon R.C. greater due process protections under the Iowa Constitution.

***4** Due process requires "fundamental fairness" in judicial proceedings. *In re J.S.,* 470 N.W.2d 48, 52 (Iowa App. 1991). Where a parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition, we cannot say the parent has been deprived of due process. *Id.* As R.C. was not deprived of the above rights, we determine R.C. was not denied due process.

Furthermore, even if R.C. had a constitutional right to "reasonable efforts," we find the State did make reasonable efforts to give services to R.C. At the beginning of the juvenile court proceedings, R.C. was ordered to complete a parenting evaluation. R.C., however, chose not to take this evaluation because of the risk of self-incrimination. Because a parenting evaluation was never obtained, it was difficult for the State to determine what services were appropriate for R.C.

Additionally, after R.C. was sent to Mount Pleasant, DHS attempted to gain information about the services R.C. was receiving at the institution from his attorney. The attorney, however, was uncooperative and did not return phone calls. DHS also attempted to call the parole board to gain information about the types of services

being offered to R.C. The parole board, however, stated such information was confidential. It is evidence DHS made many attempts to provide services to R.C. but were unable to gain the necessary information. Despite DHS's attempts to contact R.C., there is no evidence R.C. attempted to contact DHS after his incarceration. Neither R.C. nor his attorney made any inquiry about services.

DHS also has several legitimate reasons for not providing services to incarcerated people. First, agencies do not want to send their people into prison because of liability. Secondly, these is no need to duplicate services if they are already being provided by the prison system. Evidence indicates R.C. was receiving sex offender treatment in prison. These was no need for DHS to risk entering the prison in order to duplicate services. Furthermore, there was no evidence entered at trial indicating the father needed services other than sex offender treatment.

IV. Termination of S.C.'s Parental Rights.

We determine there is clear and convincing evidence these children cannot be returned to the care of their mother and termination is in the best interests of the children.

Evidence of past behavior provides insight as to the future care S.C. is capable of providing for the children. *In re L.L.*, 459 N.W.2d 489, 493-94 (Iowa 1990); *Dameron*, 306 N.W.2d at 745. In this case, evidence shows S.C. perpetrated severe sexual abuse on these children and she has not protected the children from sexual abuse by their father, R.C. With regards to S.C., one psychologist, Dr. Michael McNeil, stated, "her need to be nurtured has apparently become quite sexualized, with the result that offers of affection and care in a sexual context would seem to be much more powerful motivators than any sort of goals offered by counselors or therapists." Despite consistent reports of abuse from the children, S.C. has denied either she or R.C. sexually abused their children.

***5** Evidence also indicates S.C. trusts people very easily. She becomes sexually active with people without knowing anything about them. She allows people into her home and gives people keys to her home. S.C. has placed herself in a lot of dangerous situations and has been threatened in her home by a number of men. A DHS worker expressed concern about the children being at risk of further sexual abuse by S.C. and the men with whom she associates. McNeil expressed concern about S.C. choosing abusive men over the safety of her children. McNeil and Mr. Steve Feierstein, M.Ed., also stated S.C. was not yet able to protect herself or the children. Feierstein noted, "[S.C.] does not know how to differentiate between helpful and hurtful people due to her mental deficiencies."

Given these facts, we determine there is clear and convincing evidence the children cannot be returned to the custody of S.C. It is extremely likely the children would suffer further abuse if returned to S.C. As such, the statutory grounds for termination under Iowa Code section 232.116(1)(e) and (g) are present. S.C., however, argues, even if the statutory grounds for termination are present, termination is not in the long-term best interests of the children. We disagree.

Evidence indicates S.C. will never be able to care for these children in a setting other then visitation. These children should not be forced to endlessly suffer "the parentless limbo" of foster care so S.C. can maintain visitation with them for her own benefit. *See Long*, 255 N.W.2d at 146. Children need not endlessly await the maturity of their natural parents. *In re T.C.D.*, 336 N.W.2d 738, 744 (Iowa 1983). "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). "Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *In re L.L.*, 459 N.W.2d at 495. To continue to keep these children in temporary foster homes is not in their best interests. *See In re J.L.P.*, 449 N.W.2d 349, 353 (Iowa 1989).

V. Adequacy of Services Provided to S.C.

Iowa Code section 232.102(5)(b)(1993) requires reasonable efforts be made to reunite a family. *In re L.M.W.*, 518 N.W.2d 804 (Iowa App. 1994); *In re A.L.*, 492 N.W.2d 198, 201 (Iowa App. 1992). When the State fails to make reasonable efforts to reunite the family, reversal of the lower court determination to terminate parental rights is warranted. *In re J.P.*, 499 N.W.2d 334 (Iowa App. 1993). S.C. contends the State did not make reasonable efforts because it did not make reasonable accommodations to meet S.C.'s special needs. We determine there is clear and convincing evidence DHS made reasonable efforts towards reunification and provided adequate services to S.C.

S.C. was offered many services by the DHS in an effort to reunify the family. Many of these services were geared towards low functioning individuals such as S.C. DHS made several attempts to have S.C. participate in individual counseling through Polk County Mental Health. S.C., however, refused these services. S.C. was offered specialized services through the Parent Infant Nurturing Center (PINC) program which was designed for the mentally retarded/developmentally disabled. S.C., however, failed to complete the in-home visitation portion of this program and attempted to cut short every visit with her children. S.C. was offered vocational rehabilitation and a group home or independent living, but she refused assistance. S.C. was also offered services with IFSAP, but S.C. was uncooperative.

***6** Other services offered to S.C. included: Family Preservation Program; child protective treatment services; a Generations worker to assist with housing and intakes for services; a CFI payee to assist with budgeting; a case work social worker from Adult Mental Health Services; Parent Growth to improve parenting skills; CASA to monitor the case and assist in following through with services; and, therapy at BMC with Toni Bell to work through issues of sex abuse as both a victim and perpetrator.

Despite these services, S.C. was resistant to many services and failed to make any significant progress in improving her parental skills. We determine the State did make reasonable efforts towards reunification and also provided S.C. with adequate services. Furthermore, the State did not fail to provide reasonable accommodations for S.C.'s disability as it provided many services geared towards persons with S.C.'s disabilities.

VI. Disability Discrimination.

The **ADA** prohibits a public entity from discriminating against a disabled person by excluding her from participation or by denying the benefits of public services, programs, or activities. *In re C.M.*, 526 N.W.2d 562, 566 (Iowa App. 1994) (citing 42 U.S.C. section 12132 (1993). The **ADA** requires the public entity to make "reasonable accommodation" to allow the disabled person to receive the services or participate in the public entity's programs. *Id.* (citing 28 C.R.F. section 35.130(b)(7) (1994).

S.C. argues she was discriminated against because of her developmental and mental disabilities. S.C. claims DHS failed to make reasonable accommodation in the delivery of services. She further claims she was denied visitation privileges because of her disability and, after her visitation privileges were denied, visitation could never be restored because of her disability. We determine S.C. was not discriminated against on the basis of her disability and DHS made reasonable accommodations to allow S.C. to receive and participate in services.

There is no evidence in the record indicating S.C. was denied certain services because of her disability. As indicated in Division V. of this opinion, DHS offered S.C. numerous services geared towards mentally disabled persons. S.C., however, was uncooperative with services and did not make progress toward improving her parenting skills. Considering the long list of services offered, we find no evidence DHS denied S.C. services because of her mental disability.

There is also no evidence in the record indicating S.C. was denied visitation with her children because of her disability. After the children were found to be CINA, S.C. was given supervised visitation with the children. S.C.'s visitation rights were not suspended until after DHS discovered S.C. had sexually abused the children. Obviously, suspension of S.C.'s visitation privileges was due to the sexual abuse she perpetrated against the children, not her mental disability. After visitation was suspended, the court did not rule out future visitation stating, "[V]isitation may take place at the discretion of the therapists for the children and the mother, in a therapeutic setting at such time as the therapists believe it to be in the best interests of the children." Clearly, S.C.'s mental condition was not the reason for suspension of her visitation privileges, and restoration of such privileges was not denied because of her disability.

***7** Furthermore, there is no evidence S.C.'s parental rights were improperly terminated merely because of her mental disability. While mental disability, standing alone, is not sufficient reason for termination of the parent/child relationship, it is a contributing factor to the inability to perform the duties of a parent. *In re J.W.D.*, 456 N.W.2d 214, 218 (Iowa 1990); *In re T.O.*, 470 N.W.2d 8, 11 (Iowa 1991).

> [The mother's] mental disability is a proper factor for this court to consider in determining whether these children have been, and will be, neglected to the

> point where their interest and welfare required termination .... [T]ermination [is] appropriate when the disabled parent lacks the capacity to meet the child's present needs as well as the capacity to adapt to the child's future needs. Further, Iowa Code section 232.116(2)(a) states that in considering a termination of parental rights such consideration may include whether the parent's ability to provide for the child's needs is affected by the parent's mental capacity or mental condition.

In re T.O., 470 N.W.2d at 11.

S.C.'s mental condition was not the only basis upon which the juvenile court terminated her parental rights. Termination of S.C.'s parental rights was based upon S.C.'s sexual abuse of the children, S.C.'s inability to protect the children from the sexual abuse of others, S.C.'s failure to admit she and R.C. sexually abused the children, S.C.'s failure to cooperate with services, S.C.'s failure to improve her parenting skills, and the best interests of the children. Termination of her parental rights was not based on her mental disability alone.

We determine S.C. was not discriminated against on the basis of her disability and DHS provided reasonable accommodations to allow S.C. to receive and participate in services.

VII. Preclusion of Guardian Ad Litem from the Trial Process.

S.C. also argues the trial court improperly precluded the guardian ad litem from participating in the trial process. We agree the guardian ad litem should not have been prevented from participating in the trial. Nevertheless, given the overwhelming evidence in support of termination, including the sexual abuse perpetrated by S.C. and the children's placement for adoption, we are compelled to affirm. The mother has not shown prejudice occurred because of the preclusion of the guardian ad litem from the trial process. It was in the best interests of the children to terminate S.C.'s parental rights.

VIII. Improper Procedures.

S.C. argues the juvenile court did not follow proper procedure because it failed to make its own independent "findings of facts," "conclusions of law," and "judgment." We agree. A court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, must find the facts in writing, separately stating its conclusions of law, and direct an appropriate judgment. *In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994). Where juvenile orders do not contain written findings and statements as required by statute, procedural due process rights are implicated. *Id.* Nonetheless, our de novo review of the case, as set out above, requires we affirm the judgment of the juvenile court.

***8** AFFIRMED.

All Citations

Not Reported in N.W.2d, 1995 WL 810019, 5 A.D. Cases 213

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1996 WL 309979

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fourth District, Athens County.

In the Matter of Jonathan
BURROWS, Alleged Dependent Child.

No. 95CA1698.
|
May 30, 1996.

Attorneys and Law Firms

Susan L. Oppenheimer, Athens, for Appellant, Patricia Burrows, Natural Mother.

David J. Winkelmann, Athens County Asst. Prosecutor, Athens, for Appellee, Athens County Children Services.

William R. Walker, Athens, for guardian ad litem, Terri Cumbie.

DECISION AND JUDGMENT ENTRY

HARSHA, Judge:

*1 Patricia Burrows appeals from a judgment of the Athens County Court of Common Pleas, Juvenile Division, which awarded permanent custody of her son, Jonathan Burrows, to Athens County Children Services. She assigns the following errors for our review:

I. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING PERMANENT CUSTODY WITHOUT CONSIDERING THE REASONABLE ACCOMMODATION REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973, ATHENS COUNTY CHILDREN SERVICES' FAILURE TO MAKE REASONABLE ACCOMMODATION FOR APPELLANT'S DISABILITY IN ITS CASE PLANNING AND EFFORTS AT REUNIFICATION, AND THE IMPACT ON THE APPELLANT OF THE AGENCY'S FAILURE TO PROVIDE REASONABLE ACCOMMODATION. (TRANSCRIPT AND ORDER)"

II. "THE TRIAL COURT'S DECISION WAS CONTRARY TO LAW INSOFAR AS IT IMPOSED A REQUIREMENT THAT APPELLANT CURE HER MENTAL ILLNESS IN ORDER TO HAVE CUSTODY OF HER OWN SON. (ORDER)"

III. "THE TRIAL COURT ERRED IN AWARDING PERMANENT CUSTODY TO ATHENS COUNTY CHILDREN SERVICES AND DENYING APPELLANT'S MOTION TO DISMISS, WHEN THE AGENCY FAILED TO PROVE THE ESSENTIAL ELEMENTS OF O.R.C. § 2151.414 BY CLEAR AND CONVINCING EVIDENCE AND THERE WAS NO RECORD EVIDENCE TO SUPPORT MANY OF THE FACTUAL FINDINGS AND CONCLUSIONS ON WHICH THE COURT BASED ITS DECISION. (TRANSCRIPT AND ORDER)"

IV. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT, IN ADMITTING THE TESTIMONY AND REPORT OF DR. SUZANNE APPLE. (TRANSCRIPT)"

V. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT, IN ADMITTING THE TESTIMONY OF DR. MEHMET KAVAK. (TRANSCRIPT)"

VI. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT, IN FAILING TO CONSIDER ALL RELEVANT EVIDENCE AT THE ADJUDICATION PHASE OF THE PROCEEDING. (TRANSCRIPT)"

VII. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY AWARDING PERMANENT CUSTODY WITHOUT MAKING THE EXPRESS FINDING THAT PERMANENT CUSTODY IS IN THE BEST INTEREST OF THE CHILD. (ORDER)"

VIII. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO CONSIDER ALL RELEVANT EVIDENCE AT THE DISPOSITIONAL

PHASE OF THE PROCEEDING. (TRANSCRIPT AND ORDER)"

Athens County Children Services ("ACCS") filed a complaint alleging that Jonathan Burrows was a dependent child pursuant to R.C. 2151.04. The Juvenile Division of the Athens County Court of Common Pleas determined that Jonathan Burrows, in fact, was a dependent child and granted temporary custody to ACCS. The court periodically held review hearings and continued temporary custody with ACCS. Then, ACCS filed an amended complaint seeking permanent custody. The court again entered a finding that Jonathan Burrows was a dependent child pursuant to ACCS' amended complaint.

Patricia Burrows, the natural mother of Jonathan Burrows, did not appear for the permanent custody hearing. Prior to her son's birth, Patricia Burrows was diagnosed with borderline personality disorder and was receiving services from the State Operated Intensive Case Management Program ("SOS"). While SOS encouraged Patricia Burrows to seek assistance from ACCS prior to her son's birth, ACCS did not provide assistance until after Jonathan Burrows was born.

***2** Patricia Burrows had custody of her son for the first two months of his life and was home with him all day almost every day. ACCS provided homemaking services and respite care on a voluntary basis. ACCS also drew up a case plan, stating that Patricia Burrows should use protective day care as a support service. Patricia Burrows used the protective day care one day a week for respite. Additionally, she left her son in the care of others.

When Jonathan Burrows was around two months old, Patricia Burrows needed in-patient treatment for her borderline personality disorder. She signed a voluntary agreement for care to place her son in the care of ACCS during her hospitalization. In a unique show of good faith, the day after Patricia Burrows voluntary placed her son with ACCS for care, ACCS filed a complaint for temporary custody of Jonathan Burrows. Temporary custody was granted to ACCS based on Patricia Burrows's extensive use of respite services and her practice of leaving her son in the care of individuals who were not affiliated with ACCS' protective day care. Patricia Burrows had supervised visitation in her home three times per week for one and one-half hours per visit. Extensive support and counseling services were provided to her. Subsequently, the case plan was amended so that Patricia Burrows' visitation was monitored rather than supervised. After having been twice admitted for emergency treatment related to her borderline personality disorder, Patricia Burrows requested that ACCS change her visitation from monitored in her apartment to supervised at ACCS's facilities. Patricia Burrows then left town for a period of about two months. She did not contact her son during this two month period.

Upon her return, Patricia Burrows continued support services and visitation. She was again admitted to the Southeast Psychiatric Hospital for treatment for her borderline personality disorder. One month after her treatment, in December 1994, Patricia Burrows left town and had not returned as of the time of the permanent custody hearing.

In March 1995, the court held both the adjudicatory and dispositional hearings for the permanent custody of Jonathan Burrows. The court found, by clear and convincing evidence, that ACCS provided reasonable case planning and worked diligently to help Patricia Burrows remedy the conditions that caused her son's removal, that her son could not be placed within her care within a reasonable period of time, and that she had failed to support, visit or communicate with her son. The court also found that it was in the best interest of the child to grant permanent custody of Jonathan Burrows to ACCS. Patricia Burrows appeals this judgment entry.

Her first assignment of error contends that the trial court failed to apply the "reasonable accommodation" requirements of the Americans with Disabilities Act. [1] We must first consider, as a matter of law, whether the ADA applies to state actions terminating parental relationships.

***3** For purposes of this appeal, we assume without deciding that the ADA applies to this case. [2] Having made that assumption, we must decide whether or not ACCS complied with the ADA. The trial court's decision on this factual inquiry will not be disturbed unless it is against the manifest weight of the evidence. An appellate court will not reverse the decision of a trial court as against the manifest weight of the evidence if the trial court's decision is supported by any competent, credible evidence which goes to all the essential elements of the case. *Sec.*

Pacific Natl. Bank v. Roulette (1986), 24 Ohio St.3d 17, 20; *C.E. Morris Constr. Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. This standard of review is highly deferential. Even "some" evidence is sufficient to sustain the verdict and prevent a reversal if it applies to all the essential elements of the case.

Under the ADA, a public agency is under a duty to provide "reasonable accommodations" for a person's disability. Appellant contends that ACCS failed to provide reasonable accommodations for her borderline personality disorder when it developed a case plan and assistance designed to remedy the problems that initially caused Jonathan to be placed outside the home. Appellant bears the burden of proving that ACCS failed to provide reasonable accommodations in light of her disability in affording her an opportunity to rehabilitate and reunify with her child. *In re Angel, supra.* The record shows that appellant failed to demonstrate any services which ACCS should have offered to reasonably accommodate her for her disability.

During the permanent custody hearing, appellant presented testimony from Dave Walters, the clinical supervisor at Health Recovery Services. When Mr. Walters was asked what specific services he would have recommended that weren't provided in this case, he testified that he "would have visioned (*sic*) something that was not available and probably wasn't reasonably going to be available." Mr. Walters also suggested provision of services such as case management and respite day care which *were* offered by ACCS. It appears from the record that the only services suggested by Mr. Walters which ACCS failed to provide were better communication between SOS and ACCS and residential services provided to both appellant and her child where appellant would never experience a separation from the child. The issue of lack of communication between agencies may have some merit, but we cannot conclude it satisfies appellant's burden in and of itself. Moreover, Mr. Walters testified that the joint residential services which he suggested are predominately found in Europe and not in the United States. Thus, appellant's own witness testified that any further accommodations which could be made would not be reasonable. Appellant offered no other evidence to sustain her burden of proof.

Furthermore, ACCS provided appellant with various special services such as parenting classes and transportation to these classes to help her with her parenting skills. ACCS also provided appellant with a homemaker who would assist her in infant care, answer any questions, and directly help appellant clean and care for Jonathan, as well as provided protective day care and a crisis nursery. Along with these special services, appellant received psychiatric care and social services from ACCS, SOS, and other providers. Thus, ACCS offered a number of services that took appellant's disorder into account. Appellant failed to demonstrate other specific services which ACCS should have provided to accommodate for her borderline personality disorder. Accordingly, the trial court's decision that appellant failed to carry her burden of proof to establish that ACCS did not reasonably accommodate appellant is supported by the manifest weight of the evidence. Appellant's first assignment of error is overruled.

***4** We will next address appellant's third assignment of error which argues that the trial court erred in awarding permanent custody to ACCS because the record was void of any clear and convincing evidence to prove the essential elements of R.C. 2151.414.

R.C. 2151.353 states that if a child is adjudicated dependent, the court may commit the child to the permanent custody of a public children service agency if the court determines in accordance with 2151.414(E) that the child cannot be placed with either of his parents within a reasonable period of time, and further determines in accordance with R.C. 2151.414(D) that it is in the child's best interest to be permanently placed. The R.C. 2151.414 permanent custody determination must be supported by clear and convincing evidence. *In re Hiatt* (1993), 86 Ohio App.3d 716, 725; *In re Harding* (Jan. 14, 1993), Cuyahoga App. No. 63520, unreported; *In re Stapleton* (June 12, 1991), Scioto App. No. 1964, unreported. "Clear and convincing evidence" is defined as that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will provide in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cincinnati Bar Assn. v. Massengale* (1991), 58 Ohio St.3d 121, 122. An appellate court, in reviewing awards of permanent custody of children to public children services agencies, will affirm judgments supported by some competent, credible, evidence. *Jones v.*

Lucas Cty. Children Serv. Bd. (1988), 46 Ohio App.3d 85, 86; *Stapleton, supra,* at 14.

Here, the evidence showed that appellant would disappear and leave Athens County for long periods of time without attempting to contact her son or the day care providers while she was gone. In fact, appellant went to California in December of 1994 and had not returned at the time of the permanent custody proceedings, although she had been notified. Prior to December 1994, appellant had left town for a period of over two months without contacting anyone. At times, appellant admitted to the case workers her inability to care for her son, she requested supervised visits at the agency after she was granted monitored visits in her home, and she pursued an interest in putting Jonathan up for adoption. There was also evidence in the record indicating the problems persons with borderline personality disorders have with personal relationships and the possible difficulties they may have in raising children. While the testimony concerning borderline personality disorders revealed that the disorder gets better over time and that a person with a borderline personality disorder can provide a good home for a child, the evidence shows that appellant demonstrated a lack of commitment toward Jonathan by failing to regularly visit and communicate with him.

We realize there is evidence in the record which supports appellant's contention that her conduct was at least in part a reaction to ACCS' breach of good faith in immediately seeking permanent custody after appellant voluntarily placed her son with the agency. However, our standard of review is highly deferential and the existence of any evidence to support the trial court's judgment requires us to affirm it. In short, there was competent, credible evidence to support the trial court's determination that permanent custody was in the best interest of Jonathan and that he could not be placed with appellant within a reasonable time or should not be placed with appellant. Appellant's third assignment of error is overruled.

***5** Appellant's second assignment of error contends that the trial court's decision was contrary to law because it required appellant to cure her mental illness before regaining custody of her son. We have already determined that there was competent, credible evidence supporting the trial court's decision. However, appellant argues that the standard applied by the court in rendering its decision, *i.e.,* that she cure her mental illness, is unlawful because it discriminates against persons with mental disabilities. This issue presents us with a legal question which we review *de novo.*

The trial court found that the conditions causing Jonathan's removal from appellant's care were related to her psychological problems and that her "mental condition has not been remedied *to the extent* that she can now, or in the foreseeable future, care for Jonathan." (Emphasis added.) These findings do not impose a requirement upon appellant that her mental condition be totally cured before regaining custody of her child. In its opinion, the trial court explained that appellant was provided services to assist her in caring for her son, despite her mental condition, but had not improved her ability to cope with caring for her son. Furthermore, the court sustained appellant's objection to questions to Dr. Kavak concerning the disorder on the basis that it was not relevant. See Tr. at 47. Thus, it is obvious the court agreed with appellant on this point. The requirement imposed by the court was that the conditions causing removal of her son be remedied, *i.e.,* improved. We see no legal error in that standard.

Lastly, we agree with appellant that there must be a nexus between her conduct and its adverse effect upon the best interests of Jonathan before the court could grant permanent custody to ACCS. We do not agree however, that there is a requirement for a witness, either expert or lay, to explicitly state the obvious. The court quite properly could infer that a parent's absence is detrimental to a child, and the lack of foreseeable improvement in appellant's condition would result adversely on her parenting skills in the foreseeable future. Appellant's second assignment of error is meritless.

Appellant's fourth and fifth assignments of error concern the admissibility of expert testimony. The admission or exclusion of expert testimony, and the scope thereof, rests within the sound discretion of the trial court. *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St.3d 27. Accordingly, the appellate court will not reverse the decision of the trial court absent an "abuse of discretion." *State v. Sage* (1987), 31 Ohio St.3d 173. The term "abuse of discretion" implies that the court's ruling was "unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Therefore, to find an abuse of discretion, we must find that the trial court committed more than an error of judgment. When applying the abuse of discretion

standard, a reviewing court is not free merely to substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, citing *Berk v. Mathews* (1990), 53 Ohio St.3d 161.

***6** In appellant's fourth assignment of error, she argues that Dr. Apple's testimony and report should not have been admitted into evidence because her opinions were not expressed with a reasonable degree of certainty, her testimony and report were based upon inadmissible hearsay, and Dr. Apple never completed a psychological assessment of Ms. Burrows. By agreement of the parties, the court ordered Dr. Apple to conduct a psychological evaluation upon appellant to be utilized by all parties at the permanent custody trial. Dr. Apple met with appellant one time for two hours. Based upon her meeting, she filed a report with the court which mainly evaluated appellant's history and mental status. Dr. Apple admitted in her report that she could not issue any recommendations concerning parental capacity. At trial, Dr. Apple testified that she was unable to draw any conclusions concerning appellant's parenting skills. Dr. Apple did give her opinion about appellant's condition. However, in expressing her opinion, Dr. Apple used terms such as "I think." An expert opinion is only competent, and thus admissible, if it is held to a reasonable degree of scientific certainty. *State v. Benner* (1988), 40 Ohio St.3d 301, 313, citing *State v. Holt* (1969), 17 Ohio St.2d 81. Based upon Dr. Apple's own statements that she could not render an opinion, we find that her testimony and report are not admissible because her opinions were not expressed with the requisite degree of certainty. Thus, the trial court abused its discretion in admitting Dr. Apple's testimony and report.

However, the judgment of the trial court will not be reversed if the error was harmless. Civ.R. 61 requires each court at every stage in the proceedings to disregard any error or defect which does not affect the substantial rights of the parties. We find that the trial court's error in admitting Dr. Apple's testimony and report does not affect the substantial right of the appellant because even excluding the testimony and report of Dr. Apple, there was enough competent, credible evidence to support the trial court's decision. The testimony and evidence which should have been excluded was collaborated by other testimony and evidence, *i.e.,* the testimony provided by Dr. Kavak. Thus, the opinions held by Dr. Apple were properly submitted into evidence through the testimony of other witnesses. Accordingly, appellant's fourth assignment of error is overruled.

Appellant asserts in her fifth assignment of error that the court also erred when it admitted into evidence the testimony of Dr. Kavak. Appellant argues that Dr. Kavak was not competent to give an expert opinion and that his opinions were not expressed with the requisite degree of certainty. Our review of the record indicates appellant failed to raise the latter objection at any point during Dr. Kavak's testimony. Accordingly, she has waived any error in this regard. See Evid.R. 103(A).

Evid.R. 702 governs whether a witness may testify as an expert. It requires that a witness's testimony relate to matters beyond the knowledge or experience of lay persons, that the witness be qualified as an expert by specialized knowledge, skill, experience, training or education, and that the witness's testimony be based on scientific, technical, or other specialized information. Dr. Kavak was testifying about borderline personality disorders, which is a matter beyond the knowledge of lay persons. He is a licensed psychiatrist who is familiar with and has treated individuals suffering from borderline personality disorder. His testimony was based on his experiences with and education of personality disorders. Dr. Kavak had also treated appellant three of the times she was admitted for treatment of her mental disorders. Thus, the trial court did not abuse its discretion in finding that Dr. Kavak was competent to testify pursuant to Evid.R. 702. Accordingly, appellant's fifth assignment of error is overruled.

***7** Appellant's sixth and eighth assignments of error argue that the trial court erred in failing to consider all relevant evidence at the adjudication and dispositional phases of the permanent custody proceeding. R.C. 2151.414 requires the court to consider all relevant factors or evidence in determining the best interest of the child, and in determining whether a child cannot be placed with either of his parents within a reasonable period of time or should not be placed with his parents.

After a full review of the record, we find that the trial court considered all relevant evidence in making its determination. Appellant argues that since the trial court's decision did not reference certain relevant evidence in its Findings of Fact, such as appellant's satisfaction of some of the goals of her case plan or testimony about how well

she did at visits with her son, the trial court must not have considered all relevant evidence. We disagree.

In its decision, the trial court set forth "Findings of Fact" which are based on the evidence presented at the hearings and provide a chronology of the facts of the case. We agree with appellant in that not all relevant evidence presented at trial is contained in the trial court's "Findings of Fact." However, we do not draw the same conclusion from these omissions as appellant. In preparing findings of fact, the trial judge is not required to state the negative of each rejected contention as well as the affirmative of those found to be correct. The court need not make findings on a particular issue if other issues are decisive of the case. See Wright & Miller, Federal Practice and Procedure: Civil 2d, Section 2579. The findings of fact must include as much of the subsidiary, as opposed to the ultimate, facts as are necessary to disclose to the reviewing court the steps by which the trial court reached its decision. [3] *Id.*

The trial court held both an adjudicatory and dispositional hearing on the permanent custody of Jonathan Burrows. The trial court took testimony from eight witnesses and heard arguments from counsel representing ACCS, appellant and the guardian *ad litem.* Our review of the record and the trial court's decision indicates that the trial court considered all relevant evidence presented in this case.

Appellant also argues that in the dispositional phase of the proceeding, the trial court did not consider "the interaction and interrelationship of the child with his parents * * * " as required by R.C. 2151.414(D)(2). A review of the judgment entry reveals that the trial court found that Jonathan had little contact with appellant since birth, and that there was no indication of any interaction with extended family. Thus, the trial court specifically considered the interaction and interrelationship between appellant and her son. Accordingly, appellant's sixth and eighth assignments of error are without merit.

Lastly, in appellant's seventh assignment of error, she argues that the trial court committed reversible error by granting ACCS' request for permanent custody without making an express finding that permanent custody is in Jonathan's best interest. Under R.C. 2151.353(A)(4), before the court may give permanent custody of Jonathan Burrows to ACCS, it must first determine "in accordance with division (D) of section 2151.414 of the Revised Code that the permanent commitment is in the best interest of the child." Division (D) of R.C. 2151.414 lists five factors which the court shall consider, as well as all other relevant factors, when determining the best interest of a child. Neither R.C. 2151.353 nor R.C. 2151.414 require the trial court to expressly state that permanent custody is in the best interests of the child. The court is under a duty to determine the best interests of the child, considering the five factors set forth in R.C. 2151.414. We agree that the trial court did not expressly state that permanent custody was in Jonathan Burrows' best interest. However, the trial court did expressly consider all five factors enumerated in R.C. 2151.414(D) and found that Jonathan Burrows is an adoptable child, that placement is highly likely, and that an award of permanent custody will facilitate his adoption. The trial court also concluded that Jonathan has had little contact with his mother and no interaction with extended family, that his guardian *ad litem* strongly urges for permanent custody to be granted to ACCS, that he has spent a large part of his life in stable foster care, and that he needs permanency in his life which can only be reached by placing him with ACCS. Thus, without expressly stating, the trial court determined, after considering all relevant factors, that it would be in Jonathan's best interest to grant permanent custody to ACCS. While it would have been preferable for the trial court to make an express finding, given the record in this case, such a finding is clearly implicit in the decision. Accordingly, appellant's seventh assignment of error is without merit.

***8** The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

STEPHENSON and KLINE, JJ., concur in judgment and opinion.

All Citations

Not Reported in N.E.2d, 1996 WL 309979, 17 A.D.D. 379, 8 NDLR P 121

Footnotes

1 Although appellant also raised in her first assignment of error that the trial court failed to consider such requirements with respect to the Rehabilitation Act of 1973, she did not argue the Rehabilitation Act separately in her brief. Pursuant to App.R. 12(A)(2), we may disregard that portion of appellant's assignment of error concerning the Rehabilitation Act. Furthermore, in order for the Rehabilitation Act to apply, the public agency must receive federal funding. There is no evidence of record even suggesting that ACCS receives federal funds. Accordingly, we will limit our review on this issue to the Americans with Disabilities Act.

2 Courts have divergent views as to whether the ADA applies in cases involving the termination of parental rights. The following cases have applied the ADA to permanent custody proceedings: *In re Angel B.* (1995), 659 A.2d 277; *Stone v. Daviess Cty. Div. of Children and Family Serv.* (1995), 656 N.E.2d 824; *In re Welfare of A.J.R.* (1995), 896 P.2d 1298; *In the Matter of: Craig Russell Whiteman, Christine Marie Koos, and Emma Lynn Lee* (June 30, 1993), Williams App. No. 92WM000009, unreported. Alternatively, the following cases have held either that the ADA does not apply to the termination of parental rights or that the National Rehabilitation Act of 1972, which appellees argue is analogous, is inapplicable to state statutes terminating parental rights: *In re Torrance P.* (1994), 187 Wis.2d 10, 522 N.W.2d 243, 246; *State v. Penny J.* (1994), 890 P.2d 389, 392-393; *In the Matter of Commitment, Guardianship and Custody of Robert Scott T.* (1982), 86 447 N.Y.S.2d 776.

3 Findings of fact serve three distinct purposes. They define precisely what is being decided by the case in order to apply the doctrines of *estoppel* and *res judicata* in future cases. They tend to invoke care and accuracy on the part of the trial judge in ascertaining the facts. Finally, they aid the appellate court by affording it a clear understanding of the basis of the trial court's decision. Wright & Miller, Federal Practice and Procedure: Civil 2d, Section 2571. We believe all three functions have been served here.

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1997 WL 133402

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

IN RE CARESSE B.

No Docket Number.

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March 11, 1997.

Memorandum of Decision

FOLEY, J.

*1 This is an action for the termination of parental rights of Vanessa B. and Juan G. They are the parents of the minor child Caresse B. who was born on March 30, 1989. She is at the present time almost eight years of age. The petitioner has alleged that the parents have abandoned the child within the contemplation of General Statutes ù17a–112; that both parents have failed to rehabilitate themselves; that both parents have committed acts of omission or commission which have denied the child the care, guidance and control necessary for Caresse's physical, educational or emotional well being and that there is no ongoing parent child relationship as that term is defined by law. In the memorandum submitted by the petitioner, post trial, the petitioner has withdrawn the ground alleging acts of omission or commission.

In this case the mother Vanessa B. was personally served with process and was in court represented by an attorney with a court appointed guardian ad litem. The father Juan G. has not participated in any of the proceedings regarding Caresse which go back to July of 1990. The court confirmed notice to the father by publication (Sequino, J.). This court finds that the appointment of an attorney for a non-appearing, non-contributing parent of unknown address would serve no useful purpose.

The trial of this case occurred over four days during which time twenty-six exhibits were offered into evidence and the court heard from three case workers from the Department of Children and Families (DCF), Dr. David Mantel and Dr. Ruth Grant, licensed psychologists who have evaluated the mother and the child. The respondent mother testified in her own behalf and further called a DCF case worker as her only other witness. Juan G. failed to appear for trial and was defaulted by the court for his failure to appear.

The court finds the following facts by clear and convincing evidence: Vanessa B., the child's biological mother, was born on January 19, 1962 in Brooklyn, New York. She was abandoned by her biological family and was committed to the State and placed in a foster home in Trenton, New Jersey. Vanessa gave birth to her first child at the age of thirteen and that child was placed in adoption immediately after birth. A second child was born to Vanessa when she was fourteen years of age. The New Jersey Child Protection Agency became involved with that child one month after the child was born. The child was subsequently placed in the care of her paternal aunt. Caresse B., the child presently involved in this petition, was Vanessa's third child born on March 13, 1989. Vanessa gave birth to another child on December 12, 1991 and that child lives with a paternal aunt who has guardianship of the child. Each of the children have different paternities. None of the children reside with the mother. Vanessa reports to being an epileptic afflicted with grand mal seizures which she reports to having been caused by her first husband hitting her on the head with a lead pipe. Vanessa has been hospitalized on numerous occasions due to her inability to appropriately medicate herself. She reports also to having made two to three suicidal attempts by ingesting cocaine and by cutting her wrist.

*2 The case of Caresse came first to the attention of DCF just prior to July 13, 1990 when the Superior Court for Juvenile Matters issued an order of temporary custody for Caresse. It was alleged that on two occasions fires broke out in the mother's apartment while she was passed out from an overdose of her medication and the child was unsupervised. Caresse spent three months in relative foster care before being returned to her mother under an order of protective supervision. DCF, then known as the Department of Children and Youth Services, prepared court ordered expectations for the mother which included her obligation to obtain monthly monitoring of her blood level by Dr. Wong at the Hill Health Center and to co-operate with homemaker services to assist Vanessa in caring for Caresse. In January of 1992 DCF closed its file on Vanessa.

The child next came to the attention of DCF on July 23, 1992 after the child was admitted to St. Raphael's Hospital with a spiral fracture of the humerus. The hospital evaluation also indicated that the child had sustained other injuries, was under weight, under height and delayed in speech. A petition was filed with the Juvenile Court indicating that the mother had failed to provide proper medical attention in a timely fashion for Caresse. The order of temporary custody was signed on July 27, 1992. Caresse has been out of the home and in foster placement since that date. An adjudication of neglect was made on September 2, 1992 and the child was committed to the care and custody of DCF. Extensions were granted on February 22, 1994, August 31, 1995 and April 10, 1996. Her present commitment expires April 10, 1997.

As part of the expectations set by the court at the time of commitment the mother was to attend Clifford Beers for parenting classes; a parents' group session at the Coordinating Counsel for Children in Crisis; and the Connecticut Mental Health Clinic for evaluation and individual counseling. The records reflect that the mother attended only one meeting at the Clifford Beers. She failed to attend any session at the Coordinating Counsel for Children in Crisis and missed all scheduled appointments at the Connecticut Mental Health Clinic. During the nearly five years of commitment the mother has professed interest in visiting with her child, however she has failed to do so consistently and all objective observers have noted that there is no on-going parent child relationship between Vanessa and the child.

As recently as January 28, 1996 the mother attempted suicide by ingesting pills. She also recently intentionally inflicted wounds upon herself. She is presently incarcerated and when asked in court why she is in prison she said, "I'm here for violence." Mr. R., an elderly gentlemen with whom Vanessa lived, went to the court and told the judge, "I had a knife to cut his throat, but I didn't do nothing to him, but I cut my leg open because he told a fib and I was very upset."

***3** Vanessa was evaluated at the direction of the court by Dr. David M. Mantell, a clinical psychologist. Dr. Mantell reports as follows:

> The mother entered in a self preoccupied and agitated fashion, speaking to herself and rambling. She appeared disoriented to subject but slowly calmed. She is a thirty-four year old women who reports an eleventh grade education and four out of wedlock children each with a different paternity. The mother has care and custody of none of her children. A fifth child from a fifth paternity developed in her fallopian tube. The mother reports that maybe two of her pregnancies were planned. She describes a series of troubled relationships with different men, explaining that her stepbrother was the father of her first child. She said she is disabled from epileptic seizures, grand mal, since the age of sixteen as her husband hit her over the head with an iron pipe because she said she was leaving him.

Vanessa told Dr. Mantell that she had been raped twice in New Haven, that she did not wish to be with any man, she had quit her job and that the father of her second child is a deaf mute, who cannot hear or talk, but gets mad a lot and is now is jail in Trenton. In summary, Dr. Mantel concluded as follows:

> The mother is a chronically, psychologically disordered, mildly, mentally retarded, epileptic women with a history of multi-pregnancies, parental failure, severe dependence, battering and child neglect. She is quite limited intellectually and emotionally and presents in a childlike manner. Judgment is poor. Rehabilitative potential is considered minimal to non-existent.

Dr. Ruth Grant testified that there is no parental bond to break in this case since none exists. Her observations were made on October 23, 1995. She observed the child interact with the mother. The following is noted from Dr. Grant's report.

> Caresse responded by beginning to play out of sight under the conference table, but Vanessa thought that Caresse would bite her and got angry. Said that she was "thinking about not taking her back home because she

was getting too bad." Caresse tried to get her attention after she said that she would not take her back. The examiner had to terminate the interaction after Vanessa lost patience with the child, grabbed her hard by the shoulder and struck her hand, verbally rebuking her. She had become very angry with her for saying, "liar." After the interaction she indicated that she might think about the adoption. Caresse was removed from the room and placed with a sheriff until the social worker returned.

Dr. Grant concluded that the analysis of the projective testing done on Vanessa indicates that an impoverished background, intellectual challenges, neglect and abuse have rendered her unable to care for herself and others. Her impulse control is poor and her mannerisms are regressed. She is quick to anger, defensive, and shows extreme emotional limitations. She can be pleasant with authority figures but is demanding of those around her. Dr. Grant recommended that if Vanessa were to have any visitation at all it would have to be supervised and Vanessa should be fully instructed that physically abusing a child under her care is unacceptable behavior. In her testimony in court Dr. Grant indicated that Vanessa does not have the skills nor could she acquire the skills necessary to parent a child. Dr. Grant further indicated that she knew of no programs available through the Department of Mental Retardation that could effectively provide the necessary services for Vanessa to parent a child. With respect to the interaction between Vanessa and Caresse, Dr. Grant described the interaction as not that of a parent to a child but rather as more like two children interacting "but one of them was much bigger and stronger." Dr. Grant further indicated that while she knew of no programs available for mentally retarded parents to assist them in parenting, even if there were such a program it would not be particularly helpful with mentally retarded persons who are hostile, quick to anger and aggressive as is Vanessa. During the testimony of Vanessa she indicated she knew that the Department of Mental Retardation (DMR) is "for crazy people" and very definitely stated to her own attorney "I don't want them to send me there"! Under redirect examination by her guardian ad litem, Vanessa indicated her willingness to co-operate with the DMR in the event DCF sends her there.

*4 Vanessa's lack of co-operation with DCF is well documented however. The social studies submitted by DCF for termination of parental rights was admitted as Exhibit 3A. On page 10 of that social study the case worker indicates the degree of compliance by Vanessa with the expectations of the court. Vanessa has not complied with the expectation to keep DCF aware of her whereabouts. Vanessa has missed 17 scheduled appointments with DCF. The visits with the child have been irregular and inconsistent. With respect to services offered Vanessa, including individual counseling and parenting classes, Vanessa has failed to co-operate. As earlier indicated, she did not complete the Clifford Beers parenting classes; she went to only one meeting. She went to none of the appointments for the Coordinating Counsel for Children in Crisis which is a parent group counseling program. DCF scheduled appointments at the Connecticut Mental Health Clinic for evaluation and individual counseling. Vanessa did not attend any of those scheduled appointments. Vanessa has failed to secure and maintain adequate housing for the care of herself and her child. After nearly five years of foster care Vanessa offers no plan for reunification with her daughter.

A further expectation was that Vanessa would avoid any involvement with the criminal justice system. Vanessa did not comply with this expectation as she is presently incarcerated. The child has been in foster care for nearly five years and Vanessa is no closer to rehabilitating herself to be able to parent this child than she was when the adjudication of neglect was made in 1992.

The respondent mother claims that DCF violated the Americans with Disabilities Act, 42 United States Code ù12132. Specifically, she claims that DCF is a "public entity" as that term is defined in the Act, and that the respondent mother is a "qualified individual with a disability" by virtue of her seizure disorder and possible mental retardation.

The respondent argues that the intent of Congress is to help "individuals with a disability who with or without reasonable modification to rules, policies, or practices meets the essential eligibility requirements for receipt of services or their participation in programs or activities provided by a public entity."

If DCF had failed to provide or offer reasonable services to the respondent the allegation of violation of the Americans with Disabilities Act (ADA) might have some application. That, however, is not the case. The respondent, Vanessa, has been treating medically with

physicians since she was sixteen years of age and has medication for treatment of her epilepsy. There is no claim advanced that Vanessa was denied medical treatment. With respect to her psychological or emotional needs the department consistently tried to enroll Vanessa at the New Haven Family Alliance, the Connecticut Mental Health Center for assessment and therapy and the Coordinating Counsel for Children in Crisis for parents group therapy. Vanessa has consistently resisted repeated offers for counseling.

***5** Under regulations promulgated under the ADA, 28 C.F.R. ù35.130(e)(1), the regulations state as follows:

> Nothing in this part will be construed to require an individual with a disability to accept an accommodation aid, service, opportunity or benefit provided under the ADA or this part which such individual chooses not to accept.

The department social workers cannot compel an adult to attend counseling or to benefit from services. The parent must be motivated to seek and benefit from treatment and Vanessa was not sufficiently motivated to keep her scheduled appointments.

The mother's ADA argument implicitly suggests that reasonable services were available to accommodate Vanessa's disabilities. The court finds that there was no offer of proof that such services are available. Indeed, the services required to provide twenty-four hour support to Vanessa would have to be of such magnitude as to constitute surrogate parenting. Vanessa is emotionally and intellectually little more than a child herself. She is unable to provide spiritual and intellectual guidance and the consistent round the clock physical care required of a minor child. She is frequently incapacitated by illness. She is quick to anger and hostile. She is presently incarcerated in jail. She has had multiple dysfunctional relationships and according to Dr. Mantel, functions as a seven or eight year old. In short, the court finds by clear and convincing evidence that mother has no parenting ability whatsoever and that no reasonable accommodation can be made by DCF or DMR to enable her to effectively parent this minor child.

ADJUDICATION

The court finds by clear and convincing evidence that Caresse B. was adjudicated as a neglected child being denied proper care and attention as well as being permitted to live under conditions, circumstances or associations injurious to her well being and was committed to the care and custody of the Commissioner on September 2, 1992. The court further finds by clear and convincing evidence that the respondent parents have failed to achieve a degree of personal rehabilitation as would encourage the belief that within a reasonable time considering the age and needs of the child that they could assume a reasonable position in the life of the child within reasonably foreseeable time. General Statutes ù17a–112(b)(2).

As to the father Juan G., the court further finds that in violation of General Statutes ù17a–112(b)(1) that the father has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child and as such he has abandoned this minor child.

The court finds that these grounds have existed for more than one year.

DISPOSITION

Having determined that statutory grounds exist to terminate the rights of Vanessa B. and Juan G. the court must consider whether it is in the child's best interest to enter an order of termination based upon facts existing as of the date of trial. *In Re: Romance M.*, 229 Conn. 345, 356–57, 641 A.2d 378 (1994). The court is further mandated to consider and make written findings regarding the seven findings set forth in General Statutes ù17a–112(d).

***6** (1) The timeliness, nature and extent of services offered or provided to parent and the child by the agency to facilitate the union of the child with the parent. The court finds that DCF offered visitation services to the respondent mother which included bus passes, physical transportation of the child to the mother and the mother to the child. The agency provided foster care for the child during a period of time it was hoped the mother would be able to rehabilitate herself. DCF offered the various

services as previously set forth to the mother which she did not attend. The department offered no services to Juan G. as he has not presented himself to the court as an interested party.

(2) Whether DCF has made reasonable efforts to reunify the family pursuant to Federal Child Welfare Act of 1980 as amended. The court finds by clear and convincing evidence that DCF has made reasonable efforts to reunify the child with the mother. Indeed, in 1990 the child was removed from the home and subsequently returned to Vanessa's care. Services were offered and protective supervision was provided. This demonstrates the good-faith of DCF in working toward reunification. In 1992 the child was removed again from the family home. Services were offered and the mother has failed to participate in the services. The agency cannot compel the mother to benefit from the services. With respect to the respondent father, this parent has been unable or unwilling to participate in reunification efforts and as such DCF was unable to provide services to him.

(3) The terms of any applicable court order entered into and agreed upon by any individual or agency and the parent and the extent which all parties have fulfilled their obligations under such order. The department with the approval of the court set reasonable and realistic expectations in order to reunify the mother and the child. There was only minimal compliance by the mother. There was no compliance or participation by the father.

(4) The feelings and emotional ties of the child with respect to his parents and any guardian of his person and any person who has exercised physical care, custody or control of the child for at not relate to her mother as a parent. They relate to each other as one child to another. While Dr. David Mantell observed that there was a good deal of affection expressed between mother and child he further noted that "the mother seems dependent upon the child's affection and does not understand the requirements of the adult role. Because of her own neediness the mother cannot empathize with the child. I do not think the mother can set expectations for the child's age and ability and mother and child contact probably has a disabling impact on the child." The child has no known memories of the male biological parent. The child does have a strong emotional tie with the foster mother. Dr. Mantell observed that he found the child and foster mother mutually very comfortable.

*7 (5) The age of the child. The court finds that Caresse will be eight years old within the month. She has been in foster care for five years. The child requires stability in placement and continuity of care that should not wait. The child's attorney recommends termination of parental rights to allow for permanent placement of the child.

(6) The efforts the parent has made to adjust his circumstances, conduct or conditions to make it in the best interest of the child to return him to his home in the foreseeable future including but not limited to:

a) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to the incidental visitations, communications, contributions and

b) the maintenance of regular contact or communications with guardian or other custodian of the child.

The court finds that the visitation by the mother has been inconsistent and irregular, that the mother has failed to take any substantial action to correct the numerous dysfunctional aspects of her personality. She has failed to maintain a stable home and has offered no plan for the care of this child in the future. She has managed her affairs in such poor fashion that she is now incarcerated.

(7) The extent to which a parent has been prevented from maintaining a meaningful relationship by the unreasonable act or conduct of the other parent of the child or the unreasonable act of any other persons or by the economic circumstances of the parent. While it is observed that the mother has very limited funds available to her, principally from social security, economic factors did not prevent regular and continuing contact with the child nor did they impact on the availability of services for her. DCF attempted to encourage contact with the child. No unreasonable conduct by DCF is noted. The father showed no interest whatsoever in having a meaningful relationship with this child. The services that were offered to Vanessa were free, available and appropriate. She refused individual, group and parenting counseling. There is no question but that Vanessa would have benefited greatly from counseling and therapy. Our law does not permit DCF to compel participation in therapy or counseling. Vanessa knew or should have

known, on some level. that her refusal to address her own problems would ultimately result in the permanent loss of her child.

ORDER

Having considered the foregoing facts it is found by clear and convincing evidence to be in the best interest of Caresse B. for the parental rights of her biological parents to be terminated so that she may be placed in adoption without further delay.

It is therefore ordered that parental rights of Vanessa B. and Juan G. be and hereby are terminated. It is further ordered that the Commissioner of the Department of Children and Families be appointed the statutory parent for the purpose of placing the child forthwith in adoption and to report to this court in writing as to the progress toward that end no later than 90 days from the date of this judgment. If adoption has not been finalized within six months from the date of the judgment, the Commissioner is further ordered to submit a motion to review a plan for terminated children as to this child no later than that date to ensure compliance with federal law which mandates judicial review of every child and the guardianship of this date.

***8** While the respondent mother speculates that the present foster mother may not adopt the minor child such a situation does not prevent the court from acting at this time. The Supreme Court has stated:

> This court agrees that termination of parental rights as part of the adoption process; it is clear that adoption cannot proceed unless the parent's rights are terminated in the first instance. The converse is not true. The parent's rights can be terminated without an ensuing adoption. When both parent's rights are terminated it becomes the obligation of the state to look for permanent placement for the child or children. *In Re: Theresa,* 196 Conn. 18, 30, 491 A.2d 355 (1985).

The court finds that in certain cases such as the present case it is appropriate and in the best interest of the child to terminate the parental rights irrespective of whether the foster mother intends to adopt or not. The state is required under existing Connecticut law to develop a permanency plan and the court is required to review that plan in court until a proposed adoption plans has become finalized. General Statutes ù17a–112(I).

Judgment may enter accordingly.

All Citations

Not Reported in A.2d, 1997 WL 133402, 9 NDLR P 278

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94 Wash.App. 1020

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

In Re The DEPENDENCY of C.C. (D.O.B. 11/23/95) Karie C. and David C., Appellants,

v.

STATE of Washington, D.S.H.S., Respondent.

No. 40888–7–I.

|

March 1, 1999.

Appeal from Superior Court of King County, Docket No: 95–7–01240–8 Judgment or order under review, Date filed: 06/13/1997 Judge signing: Hon. Phillip Hubbard.

Attorneys and Law Firms

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Melissa G. Wood, Seattle, WA, for Respondent(s).

UNPUBLISHED OPINION

KENNEDY.

***1** The developmentally disabled parents of C.C. (D.O.B. 11/23/95) appeal the trial court's order terminating their parent-child relationships. They contend that the State did not reasonably tailor its services to accommodate their needs as required by the Americans with Disabilities Act (ADA), 42 U.S.C.A. sec. 12132 (1989), and that the State failed to produce clear and convincing evidence that termination was justified under RCW 13.34.180. We conclude from the record that the State reasonably tailored its services to accommodate these developmentally disabled parents' special needs, but that the parents were unable or unwilling to use the services to improve their ability to parent. We also conclude that substantial evidence in the record supports the trial court's salient findings in light of the highly probable test that must be applied where facts are to be proved by clear, cogent, and convincing evidence. Accordingly, we affirm.

FACTS

C.C.'s biological parents, Karie C. (Mother) and David C. (Father), are developmentally disabled and are registered with the Division of Developmental Disabilities. C.C. was born prematurely and remained in the hospital for approximately 2 weeks. During that time, CPS Caseworker Evanne Gallagher investigated allegations that the parents were involved in domestic violence, spoke to C.C.'s pediatrician, Dr. Sarah Weinberg, and reviewed independent psychological evaluations of Mother and Father.

Dr. Weinberg opined that Mother and Father "expressed interest in the baby, but they were easily frustrated with things like dressing the baby, feeding the baby, things that would have to be routine to live with a baby." 2 Report of Proceedings at 60. She noted that Father "exhibit[ed] very poor personal hygiene[,]" *id.* at 69, and was "unkempt and unwashed." *Id.* at 61. Dr. Weinberg observed that "[Father] wanted to do a good job [with the baby], but that he could not follow through with that when action was required." *Id.* at 56. Dr. Weinberg also noted that Mother had seizures with wild, inappropriate behavior during the nights that she stayed at the hospital. As a result, Dr. Weinberg expressed concerns about the safety of a young infant living alone with Mother and Father.

Dr. Paul Johnson, a clinical counseling psychologist who evaluated Mother and Father, stated that "neither of them indicated planfulness or good judgment [.]" 3 Report of Proceedings at 14. The results of a test that Dr. Johnson administered to measure Mother and Father's abilities to consider how a child might feel in various situations "evidenced a lack of empathy for their child, lack of awareness, of how a child would feel." *Id.* at 22.

Dr. Johnson noted that Mother suffers from psychosis that is beyond medication management, and has seizures with violent episodes. He explained that Mother has an organically based personality disorder arising from irreversible brain damage: "[T]here is an actual structural brain change that is irreversible, ... there is brain damage, and that's a frequent problem with the chronic seizure disorders. And this can have personality impact that's

also somewhat, well, for the most part, irreversible." *Id.* at 32. In addition, Mother's personality tests evidenced "chronic, severe mental health problems [,]" *id.* at 70, indicating "a volatility, impulsivity, a potential for violence, anger [,]" *id.* at 13, that "would place a child in just extreme jeopardy." *Id.* at 16. Thus, Dr. Johnson recommended that Mother have no unsupervised contact with C.C.

***2** Dr. Johnson gave Father an IQ test that revealed Father's intellectual capabilities to be in the normal range. By contrast, Father had scored below average in intellectual functioning on an earlier IQ test, indicating that he was significantly mentally retarded. Dr. Johnson stated that the results from the latter test were impossible to fake, and opined that Father "was faking that he had poor IQ" in the earlier test to obtain certain funding. *Id.* at 25. He then stated that Father's potential to learn is in the normal range. Nonetheless, Dr. Johnson observed that Father "had some significant social, cultural training gaps ... from his ... lack of experiences that would help him understand how to make better decisions." *Id.* at 23. Dr. Johnson reported that Father had "a lack of awareness of the problems and the issues he would encounter as a parent trying to co-parent with [Mother]." *Id.* at 14–15. Dr. Johnson opined that Mother would need constant supervision 24 hours a day if she were to be allowed to parent C.C., and that Father, because of his own limitations, would not be a suitable person to supervise Mother. Because the parents planned to remain married, Dr. Johnson saw them as a "system that's going to be parenting." 3 Report of Proceedings at 34, 87. Accordingly, Dr. Johnson recommended that there be no unsupervised visitation between C.C. and either parent. Although Dr. Johnson recognized that a person with Father's non-organic problems hypothetically could overcome them with sufficient hands-on, ongoing training, he nonetheless opined that, in this case, Father has an "extreme learning disadvantage," *id.* at 68, and "a long learning curve." *Id.* at 69. Thus, although Father is educable, he could not learn the necessary skills in time to meet the developmental needs of a growing child.

Dr. Johnson concluded that reunification with C.C. was not possible in the foreseeable future for either Mother or Father.

On December 6, 1995, approximately 2 weeks after C.C. was born, the State filed a dependency petition, alleging that C.C. had "no parent, guardian or custodian capable of adequately caring for [him.]" Clerk's Papers at 2. The parents agreed that C.C. would live with Mother's Aunt Sharon and Uncle Robert. On May 1, 1996, after an uncontested hearing, the dependency court declared C.C. dependent and placed him with Aunt Sharon and Uncle Robert. The court also ordered Mother and Father to participate in individual and couples counseling, to obtain parenting skills instructions, and to receive public health nurse services.

Gallagher "supplied the parents with information about where they could arrange [individual and couples] counseling [and] gave them a list of places where they could go." 1 Report of Proceedings at 172. She also inquired of the Division of Developmental Disabilities and the public health nurse about a slower-paced, more detailed parenting class to accommodate Mother and Father's disabilities, but was unable to find such a class. Before the dependency hearing, Mother and Father attended parenting classes at the public health department once per week for approximately 7 weeks.

***3** Ruth Ohm, a home support specialist who has been supervising visits between parents and children for 20 years, supervised some of Mother and Father's visits with C.C. between January 1996 and April 1996. Although Ohm was not given a specific plan or program to implement, she testified that she understood her duties to include helping Mother and Father develop parenting skills during the supervised visitations. According to Ohm, the hands-on training "didn't go well[,]" because Mother and Father could not "grasp on to just the basic things of feeding the baby and changing him without being asked." 2 Report of Proceedings at 148. As a result, Ohm was unable to push Mother and Father to learn additional parenting skills.

In September 1996, CPS Caseworker Judith Self was assigned to C.C.'s case. Self mailed two letters recommending services, including parenting classes through the Association of Retarded Persons. Mother and Father did not participate in these classes. Self maintained that she made many efforts to contact Mother and Father, but received no responses. Self opined that "there was no indication, behaviorally from either parent that would indicate to me that they had any intention of following through ... with these services." 4 Report of Proceedings at 12–13.

On November 26, 1996, the State filed a petition to terminate Mother's and Father's parental rights with C.C. At the ensuing termination hearing, Drs. Weinberg and Johnson, CPS Caseworkers Gallagher and Self, and Home Specialist Ohm testified as above indicated.

Father reported hat he saw a psychologist three or four times in March 1997, and Mother reported that she participated in individual counseling. But neither parent sought couples counseling or other equivalent counseling to address the domestic violence issues, and neither participated in any parenting classes designed to meet his and her need for slower paced, hands-on training. Father explained that he would attend the Association of Retarded Persons parenting classes if he had the address, but then admitted that he had received a letter from Self with details about the classes. Mother also stated that she received and understood two letters from Self about the Association of Retarded Persons parenting classes.

In addition, the parents testified about domestic violence incidents between them. In April 1996, Mother was arrested for throwing a VCR at Father and threatening to stab him. Mother testified that she had a night seizure in March 1996, during which she pushed Father off the bed and into the nightstand, cutting his neck. And Mother and Father admitted that they were both arrested in 1994, before C.C. was born, for domestic violence.

Aunt Sharon and Uncle Robert also testified at the termination hearing. Aunt Sharon stated that Mother called her up to seven or eight times each day to ask if C.C. had eaten and if his diaper had been changed. Uncle Robert testified that, while Father was present, Mother pointed to a birth mark on C.C.'s forehead and accused Uncle Robert of abusing the child. After this accusation, Aunt Sharon and Uncle Robert avoided contact with Mother and Father. Aunt Sharon, who has known Mother since Mother was 2 or 3 years old, stated that she was concerned about Mother's "anger and rages and violence." 2 Report of Proceedings at 164. When asked if she had any fear of Mother, Aunt Sharon responded, "Some." *Id.* at 174. Aunt Sharon and Uncle Robert were willing to adopt C.C., but were not willing to provide supervision for any ongoing visitation between C.C. and his parents, such as might be required for an open adoption.

***4** Nancy Leonardson, C.C.'s guardian ad litem, testified that she observed Mother and Father visiting C.C. in January 1996 and June 1996. Leonardson "was concerned about [her] own personal safety" and felt uncomfortable going to Mother and Father's home after learning about Mother's unpredictable behavior and uncontrollable seizures. 3 Report of Proceedings at 109. In addition, Leonardson testified that she was aware that one of the case workers protected herself against Mother and Father by arranging for a police officer to be present in the courtroom during one of C.C.'s hearings. Therefore, Leonardson elected to hold Mother and Father's visits with C.C. in a CPS office.

During the first supervised visit, Leonardson noted that Mother and Father were very angry and "didn't pay very much attention to the baby." 2 Report of Proceedings at 12. During the second visit, she observed that Mother and Father were focused exclusively on C.C., but that Mother's "comments and activities were unusual, bordering on the bizarre." *Id.* at 16. Leonardson testified that she was concerned about Mother and Father's ability to protect C.C. from physical harm. Thus, she opined that "[e]ven if [Mother and Father] had gone to all these services that ... they were ... required by law to do, even then I think their deficits are such that they probably would not have been able to provide a secure, stable, safe environment for [C.C.]" *Id.* at 28.

Father testified that he was unemployed and had not held anything more than temporary employment during the previous 5 years. In addition, the termination hearing record contains testimony that Father's hygiene problems were so severe "that people would have to leave the building when [Father and Mother] came to visit their child." 3 Report of Proceedings at 174.

The parents submitted testimony from Dr. George Benjamin, a clinical psychologist specializing in training professionals how to psychologically evaluate parents and families. Dr. Benjamin reviewed Dr. Johnson's report and found it to be "very adequate." 4 Report of Proceedings at 61. But he opined that the court should not make a decision concerning Father's and Mother's parental rights until further professional evaluation was done. He indicated that such further evaluation could be done by his students under his supervision if the State were willing to pay more for the evaluation than required by the then-current contract between Dr. Benjamin and the State.

The parents also presented testimony from one of Mother's co-workers and another witness that Mother was a gentle, reliable employee who loved children and that Mother and Father had a loving relationship.

On June 13, 1997, the trial court terminated Mother and Father's parent-child relationships with C.C. They appeal.

DISCUSSION

"An order terminating parental rights must be affirmed if substantial evidence supports the trial court's findings in light of the degree of proof required." In re Dependency of H. W., 92 Wash.App. 420, 961 P.2d 963, 966 (1998). A trial court may enter such an order if it finds that the State establishes six allegations by clear, cogent, and convincing evidence. RCW 13.34.180, -. 190; In re Dependency of J. C., 130 Wash.2d 418, 427, 924 P.2d 21 (1996). The trial court must also find by a preponderance of the evidence that termination is in the best interest of the child. H.W., 961 P.2d at 966.

***5** In the present case, Mother and Father dispute the trial court's findings that all services ordered were offered or provided, and that all necessary services, reasonably available and capable of correcting their parental deficiencies in the foreseeable future were offered or provided; that there is little likelihood that conditions will be remedied so that C.C. can be returned to them in the near future; and that continuation of their parent and child relationships would clearly diminish C.C.'s prospects for early integration into a stable and permanent home. See RCW 13.34.180(4)-(6). Each parent also challenges the trial court's findings that he and she have psychological incapacities or mental deficiencies that are so severe and chronic as to render them incapable of providing proper care of the child for extended periods of time and that both parents were unresponsive, hostile and distrustful of their caseworkers and not amenable to working with their caseworkers, and that, although all services that are theoretically capable of meeting the parents' needs were offered, in fact, their deficiencies are incapable of being corrected. See RCW 13.34.180(5)(b). In addition, Father maintains that the trial court erred by considering his and Mother's parenting abilities collectively, rather than evaluating each parent separately.

A. All Reasonably Available Services Were Offered or Provided

To satisfy its statutory obligation, the State, must at a minimum provide a parent with a list of referral agencies that provide the recommended services. *In re Welfare of Hall,* 99 Wash.2d 842, 850, 664 P.2d 1245 (1983). Where, as here, disabled persons are involved, the Americans with Disabilities Act requires that the State make reasonable accommodations to allow those persons to receive services or to participate in its programs. *In re Welfare of A.J. R.,* 78 Wash.App. 222, 230, 896 P.2d 1298 (1995) (citing 42 U.S.C. sec. 12132, and 28 C.F.R. sec. 35.130(b)(7)). The court can properly consider any services offered before deprivation proceedings. *In re Dependency of C. T.,* 59 Wash.App. 490, 497, 798 P.2d 1170 (1990). But "a parent's unwillingness or inability to make use of the services provided excuses the State from offering extra services that might have been helpful." *In re Dependency of P.A. D.,* 58 Wash.App. 18, 26, 792, 792 P.2d 159 P.2d 159 (1990) (citation omitted).

Here, CPS Caseworkers Gallagher and Self each provided Mother and Father with letters naming referral agencies that provided the services ordered by the dependency court. Although Gallagher's attempt to locate parenting classes through the Division of Developmental Disabilities to accommodate Mother and Father's disabilities failed, Self found appropriate classes through the Association of Retarded Persons. Nonetheless, Mother and Father failed to respond to letters they received about the Association of Retarded Persons classes and failed to maintain regular communication with the caseworkers.

***6** In *In re Dependency of H.W.,* 961 P.2d at 967–68, we held that the State failed to establish that it offered all reasonable available services to a developmentally disabled mother because it did not refer her to Division of Developmental Disabilities or offer her any of the Division's services. *In H.W.,* the mother was "responsive to the training and was, in fact, eager for more services." *Id.* at 968. But the State argued that any further services would be futile because the mother remained attached to the father, who is a convicted sex offender refusing treatment. *Id.* We rejected this argument, explaining that the State's concerns over the risk that the father may

present to the children did not justify its failure to offer services to the mother. *Id.*

By contrast, in the present case, Mother and Father are registered with the Division of Developmental Disabilities and the State made reasonable efforts to accommodate Mother and Father by working with the Division to find appropriate classes, and by locating and offering parenting classes through the Association of Retarded Persons. In addition, the State attempted to provide hands-on parenting training during the parents' supervised visitations with Ohm, the experienced home support specialist. Nonetheless, Mother and Father were unwilling or unable to make use of any of these services. Accordingly, the State was not required to offer Mother and Father extra services that might have been helpful. See P.A. D., 58 Wash.App. at 26, 792 P.2d 159.

Moreover, Mother and Father do not contest the trial court's finding that Mother's seizures cannot "be controlled sufficiently even with medication." Clerk's Papers at 141. Unchallenged findings of fact are verities on appeal, *Cowiche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 808, 828 P.2d 549 (1992). Thus, Mother and Father have effectively conceded that no services could be offered to improve Mother's seizure-related inappropriate behavior. As for Father's claim that the trial court considered the parents collectively rather than evaluating his parenting capabilities independently, the record belies the claim. Dr. Johnson provided extensive testimony regarding Father's capabilities and limitations, and concluded that despite the fact that Father was educable, his disabilities were such that he could not overcome them within a time reasonable in light of the needs of a growing child. Moreover, it was not inappropriate for the trial court to consider, in addition to its evaluations of each parent independently, Dr. Johnson's testimony that the parents intended to remain together and would be a "system that's going to be parenting" but that Father was not a suitable candidate to give Mother the constant supervision she would need in caring for the child, because of Father's own significant disabilities.

*7 In sum, substantial evidence supports the trial court's findings in support of this statutory factor.

B. Little Likelihood that Conditions will be Remedied

RCW 13.34.180(5)(b) provides that the trial court may consider:

Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future[.]

In addition, the trial court may consider parents' past histories in weighing their current fitness. J.C., 130 Wash.2d at 428, 924 P.2d 21.

Here, the record establishes Mother and Father's history of domestic violence. In addition, Mother has an organic personality disorder involving irreversible brain damage, and suffers from psychosis. And although Father is educable, overcoming his problems cannot be accomplished within the time parameters of C.C.'s needs, given the extent and nature of his learning disadvantages as discussed by Dr. Johnson. Further, Dr. Johnson expressly stated that reunification with C.C. was not possible in the foreseeable future for either Mother or Father. Drs. Weinberg and Johnson opined that Mother and Father are incapable of providing proper care for C.C. CPS Caseworker Self observed no indication that Mother and Father intended to follow through with the services that were offered. The record also contains testimony from Dr. Johnson that Father could not follow through with parenting tasks and did not indicate good judgment, and that Mother's personality was volatile and impulsive, with a potential for violence that caused people to fear her.

Further, Ohm, the home support specialist with 20 years of experience, reported that the parents simply could not learn consistent parenting skills in spite of her efforts. And Guardian Ad Litem Leonardson observed that Mother and Father were angry during a visit with C.C., and that Mother's comments and activities with C.C. were unusual. She opined that, notwithstanding the court-ordered services, Mother and Father were unable to provide a secure, stable, safe environment for C.C.

Thus, we conclude that substantial evidence supports the trial court's finding that there is little likelihood that conditions will be remedied so that C.C. can be returned to them in the near future by clear, cogent, and convincing evidence. Moreover, that same degree of convincing evidence supports the trial court's findings that services to the extent theoretically capable of meeting these parents' needs were offered, but that the parents' deficiencies are incapable of being remedied because their incapacities and deficiencies are so severe and chronic as to render them incapable of providing proper care for the child for extended periods of time.

C. Continued Custody Diminishes Prospects for Early Integration

***8** Our Supreme Court has held that this finding "necessarily follows from an adequate showing" that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. J.C., 130 Wash.2d at 427, 924 P.2d 21. Because the trial court found clear, cogent, and convincing evidence that there is little likelihood that conditions will be remedied so that C.C. can be returned to his parents in the near future, it necessarily follows that that continuation of Mother and Father's parent-child relationships clearly diminishes C.C.'s prospects for early integration into a stable and permanent home. Notwithstanding this necessary legal conclusion, the record supports this finding independently. Mother and Father urged the trial court to postpone a decision on termination and continue visitation. They suggested that the trial court order the State to pay for a custody evaluation assessment involving interviews with their extended families through Dr. Benjamin at the University of Washington. But here, Aunt Sharon fears Mother. And Mother's unfounded allegation of abuse of C.C. and her incessant phone calls caused Aunt Sharon and Uncle Robert to be unwilling to participate in ongoing visitation between the parents and C.C. According to Dr. Johnson's testimony, cooperation between adoptive parents and biological parents is critical o the success of continued visitation. Without such cooperation, continued visitation would clearly diminish C.C.'s prospects for early integration into a stable and permanent home. In sum, the record contains substantial evidence to support the trial court's challenged findings. Accordingly, we affirm the trial court's termination of Mother's and Father's parent-child relationships with C.C.

GROSSE and APPELWICK, concur.

All Citations

Not Reported in P.2d, 94 Wash.App. 1020, 1999 WL 106824

End of Document

8 of 16 DOCUMENTS

National Disability Law Reporter

IN THE INTEREST OF KIMBERLY KAYE WILLIAMS , A Child

In the Interest of Williams

No. CCL-86-2039

Texas County Court, Anderson County, Texas

1995 NDLR (LRP) LEXIS 1812; 7 NDLR (LRP) 111

July 11, 1995, Decided

A parent with paranoid schizophrenia alleged that the department of protective and regulatory services discriminated against her on the basis of disability in violation of the ADA when it filed a petition to terminate the parent-child relationship between her and her child.
HELD: for the parent.
The court concluded that the department discriminated against the parent by not complying with the requirements of Title II. The department failed to make reasonable modifications to its policies, practices, and procedures with regard to reunification services, and failed to provide the parent with reunification services that were as effective as those provide to parents without disabilities. The department failed to make reasonable modifications to its reunification services to accommodate the parent's disability. In addition, the court found that the department's rule that it did not have to develop a family service plan for the parent after the department was appointed managing conservator of the child violated the ADA. The court entered summary judgment in favor of the parent.

COUNSEL:
Counsel for Counter-Petitioner/Respondent: **[*2]** Douglas E. Lowe and Richard La Valle.
Counsel for Counter-Respondent/Petitioner: Elizabeth Lambert.

OPINION-BY: KOLSTAD , J.

OPINION:

Order Granting Respondent's Motion for Summary Judgment and Denying Petitioner's Cross-Motion for Summary Judgment

On June 26, 1995, the Court heard the Motion for Summary Judgment filed in this cause by Bridget Diane Williams, Counter-Petitioner/Respondent herein, and the Cross-Motion for Summary Judgment filed by the Texas Department of Protective and Regulatory Services, Counter-Respondent/Petitioner herein.

Counter-Petitioner/Respondent, Bridget Diane Williams, appeared by her attorneys, Douglas E. Lowe and Richard LaVallo, and announced ready for trial.

Counter-Respondent/Petitioner, Texas Department of Protective and Regulatory Services (the "Department"), appeared by its authorized representative, Julie Stephens, and by its authorized representative, Julie Stephens, and by its attorney, Elizabeth Lambert.

The Court, after examining the pleadings and hearing the arguments of counsel, is of the opinion and finds that Counter-Petitioner/Respondent Bridget Diane Williams is entitled to summary judgment on her counter-claim filed against Counter-Respondent/Petitioner, **[*3]** the Department. The Court finds that Counter-Respondent/Petitioner, the Department, is not entitled to summary judgment on its cross-motion for summary judgment. The Court further finds that the following facts exist without substantial controversy:

1. On February 24, 1986, the Department filed a suit affecting the parent-child relationship, which sought to terminate the parent-child relationship between Respondent and her daughter, Kimberly Kaye Williams.

2. On February 22, 1986, Kimberly Kaye Williams was placed in foster care because Respondent was admitted to the Rusk State Hospital and did not have any family members who could care for her child while she was hospitalized.

3. At the time of removal, Sheila M. Hill, the first child protective services worker assigned to the case, reported that Kimberly was "normal and healthy for her age."

4. Before February 22, 1986, the Department had not received any referrals that Respondent had abused or neglected her daughter.

5. The Department was appointed temporary managing conservator of the child on March 4, 1986.

6. Respondent has been diagnosed as having paranoid schizophrenia and had a long history of mental illness which **[*4]** included numerous hospitalizations for the treatment of mental illness.

7. The Department only offered Respondent the reunification services that it provided to other parents with children in its conservatorship.

8. The reunification services which were provided by the Department to Respondent consisted of homemaker services and a six-week parenting class, which Respondent completed.

9. The Department provided no modifications of the reunification services to Respondent to accommodate her mental illness.

10. In February 1988, the Department changed its permanency plan for Kimberly Kaye Williams from reunification with Respsondent to termination of parental rights.

11. On November 4, 1991, the Department amended its petition in which it requested to be appointed permanent managing conservator of the child.

12. The Department sought permanent managing conservatorship of the child for the sole purpose of satisfying the requirement that it acquire permanent managing conservatorship prior to proceeding with termination of Respondent's parental rights under section 15.024 of the Texas Family Code (recodified as section 163.003(a) of the Texas Family Code).

13. Title II of the Americans **[*5]** with Disabilities Act ("ADA"), 42 U.S.C. § 12132 became effective on January 26, 1992.

14. Respondent is a qualified individual with a disability for purposes of receiving reunification services provided by the Department within the meaning of Title II of the ADA, 42 U.S.C. § 12131(2).

15. The Department is a public entity within the meaning of Title II of the ADA, 42 U.S.C. § 12131(1).

16. Beginning January 26, 1992, the Department was required to provide Respondent with reunification services that complied with the provisions of Title II of the ADA.

17. On January 27, 1992, this Court held a hearing on the merits to determine whether the Department should be appointed permanent managing conservator of the child.

18. On March 19, 1992, this Court entered an order appointing the Department as permanent managing conservator of the child.

19. On April 20, 1992, Douglas E. Lowe, Respondent's court-appointed attorney, requested that the Department provide the following reunification services: Brigett [sic] Williams be moved back to Anderson County or Kimberly moved to **[*6]** Dallas County so visitation can commence. Bridgette Williams must be evaluated for a potential regime of chlozapine [sic]. This is the only hope for Bridgette to have a chance at a normal life and relationship with her daughter.

20. After February 1988, when the Department changed the child's permanency plan from reunification to termination, the Department offered no reunification services or modifications to Respondent.

21. Prior to September 1, 1994, the Department was required to develop a family service plan and provide reunification services unless the parent could not be found, executed an affidavit of relinquishment, or had his or her parental rights terminated pursuant to 40 TAC § 700.1304, 17 Tex. Reg. 6279 (September 11, 1992).

22. On September 1, 1994, the Department revised its rule relating to the family service plan.

23. After September 1, 1994, the Department was no longer required to develop a family service plan if the Department is appointed permanent managing conservator without terminating the parental rights pursuant to 40 TAC § 700.1332(a)(2)(B), 19 Tex. Reg. 5968 (August 2, 1994).

24. The Department did not provide reunification services to Respondent **[*7]** because it had been appointed permanent managing conservator of her child.

25. On September 28, 1994, the Department filed a petition to terminate the parent-child relationship between Respondent and the child under Section 15.024 of the Texas Family Code (recodified as section 163.003(a) of the Texas Family Code).

26. Under 28 C.F.R. 35.130(b)(1)(iii), the Department was required to provide Respondent with reunification services that were as effective as those provided to non-disabled parents in achieving the goal of family reunification.

27. Under 28 C.F.R.35.130(b)(8), the Department was required to make reasonable modifications in its policies, practices or procedures in order to avoid discrimination against Respondent based on her disability.

28. The Department failed to provide Respondent with reunification services that were as effective as those provided to non-disabled parents.

29. The Department failed to make reasonable modification to its policies, practices and procedures in order to provide reunification services to Respondent.

Declaratory Judgment

Accordingly, the Court hereby declares and enters judgment that the Department:

A. Discriminated against **[*8]** Respondent by not complying with the requirements of Title II of the ADA, 42 U.S.C. § 12132, beginning on January 26, 1992;

B. Violated Title II of the ADA, 42 U.S.C. § 12132 by failing to make reasonable modifications to its policies, practices and procedures which governed the provision of reunification services to Respondent;

C. Violated Title II of the ADA, 42 U.S.C. § 12132, and 28 C.F.R. 35.130(b)(1)(iii), by failing to provide Respondent with reunification services that were as effective as those provided to non-disabled parents in achieving the goal of family reunification; and

D. Violated Title II of the ADA, 42 U.S.C. § 12132, and 28 C.F.R. 32.130(b)(8), by failing to make reasonable modifications to its reunification services to accommodate Respondent's disability.

Further, the Court declares and enters judgment that the Department's rule, 20 TAC § 700.1332, 19 Tex. Reg. 5968 (August 2, 1994), which provided that the Department did not have to develop a family service plan for Respondent after the Department was appointed **[*9]** permanent managing conservator of Kimberly Kaye Williams, violated Title II of the ADA, 42 U.S.C. § 12132.

It is ORDERED AND DECREED that Petitioner/Counter-Respondent's Cross Motion for Summary Judgment is Denied.

Attorney's Fees

The Court finds that the sum of $7,750.00 constitutes reasonable and necessary attorney's fees for all legal work performed up to the entry of the declaratory judgment in this case. IT IS ORDERED that Counter-Petitioner/Respondent, BRIDGET DIANE WILLIAMS, recover from Counter-Respondent/Petitioner, TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES, attorney's fees in the sum of $7,750.00 for services rendered through the entry of the declaratory judgment in this case. The sum of $3,000.00 is awarded in the event of an appeal to the Court of Appeals is made but is unsuccessful. The sum of $2,500.00 is awarded in the event an application for writ of error is filed by not granted by the Supreme Court of Texas, the sum of $2,000.00 is awarded in the event the application for writ of error is granted but the appeal to the Supreme Court is unsuccessful.

It is ORDERED AND DECREED that **[*10]** all relief requested in Counter-Petitioner/Respondent's counter-claim in this cause and not expressly granted is denied.

1994 WL 149450
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

In the Matter of the WELFARE OF K.D.W., Child.

No. C5-93-2262.
|
April 19, 1994.
|
Review Denied June 29, 1994.

Appeal from District Court, Winona County; Margaret Shaw Johnson, Judge.

Attorneys and Law Firms

Karl W. Sonneman, Karin L. Sonneman, Asst. Public Defender, Winona, for appellant Father.

Julius E. Gernes, Winona County Atty., Susan E. Cooper, Asst. County Atty., Winona, for respondent Winona County.

Thomas J. Nolan, Asst. Public Defender, Winona, for respondent Child.

Considered and decided by KLAPHAKE, P.J., and SHORT and DAVIES, JJ.

UNPUBLISHED OPINION

KLAPHAKE, Judge.

*1 L.G. challenges the juvenile court's order to terminate his parental rights, claiming that the county failed to provide clear and convincing evidence to support termination and that the county should have pursued alternatives to termination because his mental disability precluded him from parenting in the conventional way. We affirm.

DECISION

K.D.W. is a five-year-old who has lived in foster care since he was twelve days old. K.D.W. is a special needs child, diagnosed with attention deficit hyperactivity disorder. He has difficulty adapting to change, entertaining himself for more than ten minutes, and requires a highly structured routine.

L.G. is the biological father of K.D.W. L.G. never married K.D.W.'s mother, lived with K.D.W., or had any unsupervised contact with his child. L.G. is mildly mentally retarded with a composite I.Q. of 58. He is a ward of the state who lives semi-independently.

In October 1991, the juvenile court determined that K.D.W. was "a child in need of protection or services" because his parents were unable to provide the special care his physical, mental, or emotional condition required under Minn.Stat. § 260.015(2a)(3) (1990). The county thereafter arranged for supervised visitation for K.D.W. and L.G. so that L.G. could learn to care for his child. The county spent several months consulting with specialists trained to work with mentally disabled individuals to tailor a unification plan. The county reviewed and modified the plan several times during its 18-month duration. Although L.G. showed a great interest in his son, the county concluded that he was unable to acquire the basic parenting skills needed to care for K.D.W.

The juvenile court may terminate parental rights to a child in need of protection under Minn.Stat. § 260.014(2a) where "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." Minn.Stat. § 260.221, subd. 1(b)(5) (1992). The party seeking termination of parental rights has the burden of proving by "clear and convincing evidence that a specific statutory ground for termination exists." *In re Welfare of B.M.*, 383 N.W.2d 704, 707 (Minn.App.1986), *pet. for rev. denied* (Minn. May 22, 1986). "The appellate court must determine whether the trial court's findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether those findings are clearly erroneous." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn.1990).

The juvenile court made 57 findings and concluded that the county developed an appropriate plan, made reasonable efforts to teach L.G. adequate parenting skills, and modified its policies and procedures to avoid discriminating against L.G. on the basis of his disability.

Although L.G. achieved five of the seven parenting plan goals, the juvenile court concluded that he had reached the apex of his ability to parent K.D.W.

Mental disability may not provide the sole basis for termination of parental rights. *See In re Welfare of J.J.B.*, 390 N.W.2d 274, 281 (Minn.1986). Nonetheless,

> ***2** [i]f mental illness or other mental or emotional disability precludes a parent from providing proper parental care and defeats all reasonable efforts to remedy the conditions which led to a determination that a child was a dependent child, the statutory requirement [of Minn.Stat. § 260.221, subd. 1(b)(5)] for termination has been met.

Id. Moreover, ample evidence and expert testimony demonstrated that L.G. would be unable to parent K.D.W. within any reasonable time period. As the *J.J.B.* court stated, "while judicial caution in severing the family bonds is imperative, untoward delay of the demonstrated inevitable is intolerable." *Id.* at 280. The juvenile court properly determined that K.D.W.'s interest "in a permanent and stable home supersede[s] those of his natural father in continuing efforts to unify them, when such efforts are unlikely to be successful in the foreseeable future." *See M.D.O.*, 462 N.W.2d at 375 (parental rights terminated only for "grave and weighty reasons," but best interest of child is primary).

L.G. also seeks protection through the Americans with Disabilities Act (ADA) which prohibits a public entity from discriminating against a disabled person by excluding him from participation or by denying the benefits of public services, programs, or activities. 42 U.S.C.A. § 12132 (Supp.1993). The ADA requires the public entity to make reasonable accommodation to allow the disabled person to receive the services or to participate in the public entity's programs. 28 C.F.R. § 35.130(b)(7) (1992).

The juvenile court found that L.G. was not denied the opportunity to benefit from the county's services in attempting to learn the parenting skills required to care for K.D.W. The record reflects that the county made reasonable efforts to unite L.G. and his son and to teach L.G. basic parenting skills. Nonetheless, K.D.W.'s best interests required termination of L.G.'s parental rights. We conclude that substantial evidence supports the juvenile court's findings, that the findings address the statutory criteria of Minn.Stat. § 260.221, subd. 1(b)(5), and that the findings are not clearly erroneous. *See M.D.O.*, 462 N.W.2d at 375.

Affirmed.

All Citations

Not Reported in N.W.2d, 1994 WL 149450

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